Supreme Court of the United States

No. 678, October Term, 1899.

THE CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY,

Petitioner,

against

HERMAN CLARK,

Respondent.

Brief for Respondent in Opposition to Application for Certiorari to the Circuit Court of Appeals for the Second Circuit.

KELLOGG, ROSE & SMITH,
For Respondent.

ABRAM J. ROSE,
Of Counsel.

In the Supreme Court of the United States.

OCTOBER TERM, 1898, NO. 773.

THE CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY,
Petitioner,
against
HEMAN CLARK,
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Brief for respondent in opposition to application for certiorari to the Circuit Court of Appeals for the Second Circuit.

This application is made on behalf of the petitioner to review a decision by the Circuit Court of Appeals for the Second Circuit, in favor of the respondent, and against the petitioner, affirming a judgment of the Circuit Court for the Southern District of New York, entered upon the report of a Referee in favor of the respondent and against the petitioner for the sum of $88,084.86.

The recovery had by the respondent was for a balance due under a written contract entered into between the parties for the building of a railroad by the respondent for the petitioner for the sum of $3,954,600.

After the completion of the work, the Chief Engineer made a final certificate, in accordance with the terms of the contract, bearing date March 3d, 1888, by which he certified that it was a final estimate of the amount and value of the work done and materials used in building the railroad, which had been "constructed, built, completed and finished, in all respects, in conformity with the agreements of said contract, except as the said Railroad Company, party of the first part, has, by agreement with said Clark, assumed the construction and completion thereof."

He then certified the amount due;

As per contract price	$3,954,600
From which deductions were made by him, amounting to	104,372 77
Leaving a balance of,	$3,850,227 23
To which he added for items not covered by contract, etc.,	45,571 56
Making a total due to the respondent of	$3,895,798 79

See Record, pages 197–203.

To this amount, as certified by the engineer, the petitioner credited the respondent for materials sold by him to it, and for certain rebates and other matters, the sum of,	34,598 90
Making the sum of	$3,930,397 69

There was no dispute in this case, but that that amount due the respondent had never been fully paid to him, unless by the transactions evidenced by a receipt signed by him on March 9th, 1888. This receipt, and it alone, it was claimed by the petitioner before the Referee and in the Court below, was a bar to any recovery by the respondent in this action.

The respondent, on the other hand, claimed that it was no bar, because the difference between the amount earned and the amount paid, amounting to $71,057.63, had never been released or discharged by him and was still due and owing.

The sum of $71,057.63 claimed by the respondent was made up of the following items:

1st. Deductions made by petitioner for nutlocks furnished by it to respondent and used by him in the construction of the road, the amount not being questioned, only the liability,	$9,558 63
2d. Deductions made by petitioner for non-completion of the railroad on the 1st day of June, 1887, in accordance with an alleged supplemental contract entered into between the parties,	40,000 00
3d. Deductions made by petitioner for moneys paid to subcontractors without right during construction, in all,	21,449 00
Making a total of	$71,057 63

Of this amount the Referee refused to allow the petitioner—

1st. The deduction for nutlocks,	$9,558 63
2d. The deduction for the forfeiture withheld by the petitioner for not completing in time,	40,000 00

The only defense to the recovery of these items by the respondent was the interposition by the petitioner of the receipt as a bar.

The only other item allowed by the Referee was the claim of the respondent under his fifth cause of action, to wit, $2,425 for timber belonging to him, converted by the petitioner to its own use, which claim was not covered by the receipt.

It will be urged in the following argument that the petitioner has not brought itself within the statute allowing writs of certiorari from this Court to the Circuit Courts of Appeal, nor within the well-established rules laid down by this Court in its decisions as to the issuance of such writs.

1st. Because the case affects no public interest, but simply private rights.

2d. Because there is no conflict between the decision in this case and those of this Court and of the State courts; but, on the contrary, the decision in this case is in direct line and full accord with the decisions both of this Court and of the State courts.

3d. Because the real ground of complaint by the petitioner is that the Circuit Court of Appeals did not apply the true rule of the decisions under the facts found by the Referee, and therefore the question sought to be reviewed by this Court is not as to what the law is, but whether upon the particular facts in this case well-settled legal principles were properly applied.

4th. Because no request was made by the petitioner for a full bench on the argument in the Court below.

Point I.

The power of this Court in certiorari will only be exercised where the importance of the questions involved, the necessity of avoiding conflict between two or more courts of appeal, or between courts of appeal

and the courts of a State, or some matter affecting the interest of the nation in its internal or external relations, demands such exercise.

In almost every case where an application such as the one now made, is either granted or refused, this Court takes occasion to say that the power of the Court to issue a writ of certiorari to the Circuit Court of Appeals, "should be exercised sparingly and with great caution."

Ex parte Lau Ow Bew, 141 U. S., 583.
Ex parte Woods, 143 U. S., 202.
Chicago and Northwestern R. R. Co. *v.* Osborn, 146 U. S., 354
American Construction Co. *v.* Jacksonville T. K. W. R. Co., 148 U. S., 372.
Forsyth *v.* Hammond, 166 U. S., 506.

The rule of this Court in respect to certioraris to the Circuit Court of Appeals is stated by Mr. Justice Brewer, speaking for the Court, in Forsyth *v.* Hammond (*supra*), as follows: "So it has been that this Court, while not doubting its power, has been chary of action in respect to certioraris. It has said, 'It is evident that it is solely questions of gravity and importance that the Circuit Courts of Appeals should certify to us for instruction; that it is only when such questions are involved, that the power of this Court to require a case in which the judgment and decree of the Court of Appeals is made final to be certified, can be properly invoked." *Ex parte* Lau Ow Bew, 141 U. S., 583-587. *Ex parte* Woods, 143 U. S., 202. Lau Ow Bew *v.* U. S., 144 U. S., 47-58. Am. Cons. Co. *v.* Jacksonville, T. and K. W. R. Co., 148 U. S., 372-383. * * * "We reaffirm in this case the propositions heretofore announced, to wit, that the power of this Court in certiorari extends to every

case pending in the Circuit Courts of Appeal, and may be exercised at any time during such pendency, provided the case is one which, but for this provision of the statute, would be finally determined in that court. And further, that while this power is coextensive with all possible necessities, and sufficient to secure to this Court a final control over the litigation in all the Courts of Appeal, it is a power which will be sparingly exercised, and only when the circumstances of the case satisfy us that the importance of the questions involved, the necessity of avoiding conflict between two or more Courts of Appeal, or between Courts of Appeal and the Courts of the State, or some matter affecting the interests of this nation in its internal or external relations, demands such exercise."

Forsyth *v.* Hammond, 166 U. S., 506.

Point II.

There is no conflict between the decision in the case at bar and the decisions of this Court, and of the other Circuit Courts of Appeal and of the State Courts, but, on the contrary, the legal principles applied by the Court below are in direct line and full accord with the decisions of this Court and of the other Circuit Courts and of the State Courts.

FIRST.—The legal principles applied by the Court below in deciding this case are, as stated in the opinions delivered by the learned Judges, as follows:

(*A*). An agreement, which is known to the law as "accord and satisfaction," is a contract, and like all other contracts it needs a consideration to make it valid; without consideration it is *nudum pactum*.

(*B*.) A receipt in full, and payment of the balance stated therein, cannot be sustained as an accord and satisfaction, unless some benefit was thereby secured to the creditor, which, but for the settlement, he would not have had.

(*C*). Payment by a debtor of a liquidated amount, presently due, and to which he has no defense that can be urged in good faith or with color of right, is not by itself a sufficient consideration to sustain the release by the creditor of other liquidated claims against the debtor.

See Opinion Judge Lacombe.

(*D*). A promise by a creditor, having a liquidated and undisputed demand against his debtor, which is wholly due and payable, to discharge the residue upon receiving payment of a part, is, according to all authorities, *nudum pactum* and totally inoperative, because the debtor is under a legal obligation to pay the whole demand.

A demand is not a disputed demand, simply because the debtor refused to pay or recognize it, for if this were true, no case would ever arise for the application of the rule.

It is disputed within the meaning of the rule only when it is so far disputed as to present a "proper case for litigation."

(*E*). In a case where the creditor having two undisputed and liquidated demands against the debtor, and the latter claiming to have cross-demands or counterclaims against the creditor, refuses to pay the creditor's demands unless the validity of the

cross demands is acknowledged and their amount allowed to him by the creditor, the promise to allow the whole amount of the cross demands has no consideration to sustain it, because in contemplation of the law no benefit could accrue to the promisor and no injury to the promisee. The promisor derives no benefit because he allows the whole; the promisee is not injured because he relinquishes nothing.

See Opinion Judge Wallace.

These rules and principles of law, it is submitted, are well settled and quite elementary. They are the rules upon which decision of this case was based in the Court below.

It is hardly necessary to say that they are not in conflict with the decisions of this Court nor of other Circuit Courts of Appeal nor of the State Courts.

In fact, the true ground of complaint on the part of the petitioner is not as to the rules of law laid down by the Circuit Court of Appeals, but that the *facts* shown in this case do not bring it within their application.

What this Court is asked to do is *not* really to resolve *a conflict in the law*, but rather to determine whether, *upon the facts in this case*, well-settled legal principles were properly applied.

As said by Mr. Chief Justice Fuller in *ex parte* Woods (*supra*), the power under Section 6 of the Act of March 3d, 1891, "Could only be properly in- "voked * * * when questions of gravity and " importance were involved.

" This must necessarily be so, in any view, and " especially when it is considered that the Circuit " Courts of Appeal were created for the purpose " of relieving this Court of the oppressive burden " of general litigation which impeded the ex- " amination and disposition of cases of public con- " cern and delayed suitors in the pursuit of justice.

"But in the interest of jurisprudence and uni-
"formity of decision, to use the language of the emi-
"nent jurist and statesman who had charge of the
"bill, provision was made under Section 6 for such
"supervision on our part as would tend to avert
"diversity of judgments and guard against inad
"vertence of conclusions in controversies involv-
"ing weighty and serious matters."

Ex parte Woods, 143 U. S., 202.

It is respectfully submitted that as there is no question in this case of an erroneous decision on a question of law by the Court below, but only whether the peculiar facts in this case brought it within well-settled legal principles, the action being simply between individuals respecting personal and private interests, no questions of gravity and importance were involved within the meaning of the statute; nor is a review of the decision necessary in the interest of jurisprudence and uniformity of decision, nor to avert diversity of judgments and guard against inadvertence of conclusions in controversies involving weighty and serious matters.

Point III.

The legal principles above enunciated were properly applied by the Court of Appeals to the facts in the case at bar.

FIRST.—The whole issue in this case, both upon the law and upon the facts, was referred to a Referee to hear and determine.

In such cases, as said by Judge Lacombe, the rule laid down by this Court is as follows: "As the Court in its judgment ordered his findings to stand

as the findings of the Court, the only questions before this Court are whether the facts found by the Referee sustained the judgment.

"As the case was not tried by the Circuit Court upon a waiver in writing of a trial by a jury, this Court cannot review exceptions to the admission or exclusion of evidence or of findings of fact by the Referee or of his refusal to find facts as requested."

Shipman *v.* Straitsville Mining Co., 158 U. S., 361.
Roberts *v.* Benjamin, 124 U. S., 64.

The only question, then, which was open to the Circuit Court of Appeals for review, was whether or not the facts found by the Referee supported the judgment rendered.

SECOND.—As already said in the statement, two items only, claimed by the respondent to have been erroneously deducted from the amount earned by him under his contract, were allowed by the Referee.

1st. A claim for nutlocks,	$9,558 63
2d. A deduction for not completing the contract in time,	40,000

THIRD.—As to the item for the nutlocks, the Referee made the following findings:

"9. That during the progress of the work the defendant purchased and furnished to the plaintiff and charged him for patented nutlocks, for which the defendant paid $9,558.63.

"10. That the said nutlocks so furnished by the defendant were used by the plaintiff in the construction of the road.

"11. That there are no provisions in the contract which require that the plaintiff and the plaintiff never agreed that he should use in the construction

of the road under said contract any patented nutlocks.

"12. That the plaintiff was ordered by the defendant to put such nutlocks on the road at the beginning of the work.

"13. That he protested against their use, and finally yielded, and used them in track laying upon the promise that the matter of the charge for nutlocks should be adjusted after the completion of the contract."

See Referee's Findings, Record, pages 112–113.

Upon the facts so found the Referee found as conclusions of law:

"3. That the plaintiff is not liable to the defendant for the sum of $9,558.63, the cost of patented nutlocks furnished by the plaintiff to the defendant and used by him in the performance of the said contract.

4. That there was no obligation imposed by the contract upon the plaintiff to furnish and pay for patented nutlocks to be used in the construction of said road.

5. That the plaintiff is not legally indebted to the defendant in any sum whatever for patented nutlocks furnished by the defendant and used in the construction of the road under said contract."

See Referee's Findings of Law, Record, page 118.

FOURTH.—As to the right of the defendant to deduct the $40,000 penalty the Referee found the following facts.

2.

"That immediately after the execution of the said contract the plaintiff proceeded to carry out

and perform the same, and did carry out and perform the same, except a portion thereof otherwise agreed between the parties, and substantially completed the same on or before the 1st day of November, 1887, and the same was duly accepted by the defendant on or about the 1st day of March, 1888."

5.

"That the consideration for the performance of said contract originally mentioned in said contract was $3,914,600, but before the execution of said contract by the plaintiff, by and with the consent of the defendant, the consideration was changed and made $3,954,600."

6.

"That the plaintiff made and entered into a supplemental contract whereby he agreed with the defendant to complete his performance of said contract on or before the 1st day of June, 1887, and to allow the said defendant by way of forfeiture, in case the said railway were not so completed by the 1st of June, 1887, the sum of $40,000."

7.

That the defendant failed to furnish the plaintiff with rights of way, as by said contract it had agreed to do in time to enable the plaintiff to complete his contract prior to the 1st day of June, 1887, or prior to the 1st day of August, 1887, but, on the contrary, delayed the plaintiff in the performance of said contract, at a point upon the said road known as Minneville, until October 27th, 1887, by reason of the neglect, failure and omission of the defendant to obtain the necessary right of way at said point so as to permit the construction of the road and completion of the contract at said point."

8.

"That the plaintiff was thereby prevented from completing his contract on or prior to August 1st, 1887, and also on or prior to June 1st, 1887, by the negligence, omission and fault of the defendant."

See Record, Findings, pages 111–112.

Upon the facts so found the learned Referee held as conclusions of law:

1.

"That the defendant is not entitled to charge the plaintiff, or to retain and deduct from the amount earned and payable to the plaintiff under said contract the sum of $40,000 as a forfeiture or liquidated damages for not completing the contract on June 1st, 1887."

2.

"That under the facts proved in this case, the plaintiff is not legally liable to the defendant for any damages for failure to complete the contract within the contract time of the time agreed upon, for the reason that the plaintiff was prevented by the negligence of the defendant, and its omission to procure the neces sary right of way, completing the work in such time."

See Record, Findings, pages 117-118.

FIFTH.—The only defense interposed by the petitioner to the payment of these just claims, which were a balance of the contract price earned by the respondent for work actually done, was a receipt which the petitioner claimed amounted to an accord and satisfaction between the parties, and was a bar to the respondent's recovery.

That receipt is set out in full both in the petition for the writ and in the brief of the counsel for the

petitioner, as well as in the opinion of the Circuit Court of Appeals, and need not be set out *in extenso* here.

The following is a summary statement of the transactions, as stated in it.

Summary.

Amount earned under contract fixed by engineer,		$3,895,798.79	(not disputed.)
Amount allowed for extras fixed by engineer,		34,598.90	"
Total,		$3,930,397.69	"
Transportation fixed by contract	$50,000	(not disputed.)	
Amount retained as security for liens, etc.,	40,000	"	
Payment in money, etc.,	3,617,306.50	3,707,306.57	"
Balance,		$223,091.12	
Payment for nutlocks,		$9,558.63	(amount not disputed.)
Retained for forfeiture,		40,000.	(amount not disputed fixed by contract.)
		$49,558.63	
Balance,		$173,532.49	(not disputed.)

The transaction as shown by the receipt was in effect as follows:

The petitioner conceded that the balance earned under the contract by the respondent, after deducting all undisputed credits, amounted to	$223,091 12
But there were two items as to which there was no dispute as to the amount, but which the petitioner deducted from the balance due the respondent, amounting to	49,558 63
Leaving the conceded balance due the respondent at all events,	$173,532 49

In the payment of the balance of $173,532.49 the petitioner did not pay one penny more than it was legally bound to pay, and which amount it is conceded was due to the respondent. But the petitioner claimed that the respondent, in consideration of the payment of the sum concededly due, agreed that he would relinquish and release all his claim to the items deducted for nutlocks and overtime, amounting to $49,558.63.

In the Court below the respondent invoked the principles of law above mentioned, and claimed that the receipt did not amount to an accord and satisfaction, and was no bar to the respondent's recovery.

1st. Because, as to all the items paid, they were wholly liquidated and undisputed in amount.

2d. Because the payment of those liquidated undisputed items formed no consideration for the release of the balance of the claim.

3d. That the rule that payment by a debtor of a part of his debt is not a satisfaction of the whole applied, and that an agreement to release under such circumstances was *nudum pactum* and unenforcible.

SIXTH.—The court below held that the facts found by the Referee brought this case directly within the principles above enunciated; and reference need only be made to the opinons of the learned Judges of the Court below to show the reasoning upon which they held those rules apppli-cable to this case.

Judge Lacombe, in his opinion, reasoned as follows: "It appears, as has already been shown, that at the time the receipt in full or proposed "accord" was prepared and submitted to plaintiff for his acceptance, the amount earned under the contract ($3,895,798.79) was a claim against the defendant "liquidated" in the strictest meaning of the term. Not only was it undisputed in the sense that defendants were willing to pay, it but it was no longer open to dispute, even if they wished to dispute it. As to the work called for by the contract, that instrument bound the defendant to pay the sums shown by the final estimate to be due whenever the Chief Engineer should certify to proper completion, and he had so certified.

The price for such work was fixed by the contract itself. As to the extra work, the Chief Engineer had certified that he had ordered it—that it was done and had fixed and determined the price for it—and the contract bound the company to pay the price so fixed. Therefore, except for the single defense of payment, the company was wholly without defense to the claim for that sum, $3.-895,798.79; it could not contest it in court "with good faith" nor with "any color of right." Had plaintiff before March 9th, 1888, brought suit for the balance of such sum remaining unpaid, after crediting the defendant with all the items of payment it asserted it was entitled to charge, the railroad company could not, assuming that its officers were conscientious, even have verified an answer which could have raised any issue or delayed plaintiff's entry of judgment beyond the time necessary to notice a motion for judgment upon the answer as frivolous. As to the items of payment, which the company insisted upon, all were and always have been conceded by plaintiff, except the cost of nut locks and the overtime penalty. When, therefore, both these items were credited to the defendant in

the receipt, it parted with nothing—not even a right to litigate—in agreeing to pay and in actually paying the balance remaining of the liquidated amount earned under the contract after deducting all alleged credits for payment. Hence there was no consideration moving to the plaintiff by reason of the payment of this sum on March 9th, 1888, and unless some other benefit to plaintiff can be found to support it, his agreement implied by receipt in full, to abandon all claim to the cost of nutlocks and overtime charged, was without consideration and *nudum pactum*.

By reference to the receipt in full, which is set forth in the 13th Finding of Fact, it will be found that the instrument disposed of another item not hereinbefore referred to in these terms; "And whereas the further sum of $34,598.90 should be credited to said Clark for materials sold by him to said company, and certain rebates and other matters of that description, etc. etc." This sum is, by the statement of account set forth in such receipt, credited to Clark, and is included in the $173,532.49, paid to him upon his signing such receipt. From what has been said before, it is plain that if at the time of the transactions relied upon, as showing accord and satisfaction, this sum of $34,598.90, so allowed to Clark, represented an unliquidated item, the amount of which he would have to establish by evidence in case he had sued to recover it, its allowance to him upon the settlement of March 9th, 1888, would be a sufficient consideration to uphold that settlement against him as an accord and satisfaction of all his claims.

The findings of fact do not give much information as to the details of this item.

It is suggested that the testimony in the case shows that it covered surplus materials, such as rails, spikes, bolts, etc., which Clark had brought on the line of the work, but had not needed; that it being more advantageous to sell them where they lay than to transport them elsewhere, plaintiff had agreed with defendant that it would take them off his hands, had made "a trade outside of the contract." But with the testimony this Court has nothing to do. It sufficiently appears from the findings that part at least of this sum was for "materials sold by (Clark) to said Company." From the engineer's certificate, which is included in

the findings, it appears that this item represented no part of the work specified under the contract, and no part of the extra work and materials ordered by him; that it was not included in his certificate, nor in the final estimate; that he made no decision about it one way or the other, and apparently that he never undertook to pass upon it. Therefore, it was not liquidated by the original contract, nor by any action of the engineer thereunder. Indeed, it is plain to a demonstration from the findings, that the item in question was not included either in the original contract or in the extra work, and must represent an additional and independent contract of sale. What the terms of that contract of sale were the findings do not disclose; if they were of such a character as to leave the price of the article sold open to future adjustment, and if no binding agreement of the parties had subsequently adjusted such price; in other words, if on March 9th, 1888, the situation was such that the plaintiff put to his suit could have recovered this item only by proof of amount furnished or of reasonable value, or of both, then it was an unliquidated item; and its allowance to the plaintiff on settlement would be a good consideration to support the contract of accord and satisfaction. If, on the contrary, before that time, either when the independent contract was made or later, the parties had settled on the quantities delivered and had agreed upon the price, not by some mere expression of willingness to pay a particular amount, but in such a way as to preclude further litigation "in good faith" or "with any color of right"—then the allowance and payment of the $34,598.90 would not constitute good consideration.

The only light we have upon this question is found in a single clause—indeed, practically in a single word—of the 14th finding of fact: "That said receipt and paper contained an accurate, truthful and undisputed account of all dealings between said parties except in the matter of the forfeiture," etc.

It is quite manifest from the findings and conclusions that the Referee uses this word "undisputed" as synonymous with *liquidated*. He was evidently satisfied from the testimony that the prior transactions between the parties were such that this sum was not more open to dispute than was

the sum of $3,895,798.79 to which the Chief Engineer had certified. By what process it was so liquidated does not appear in the findings, and no one seems to have asked the Referee to find the facts more specifically. We must take his finding, therefore, as conclusive upon the question, and assume that, either by agreeing for a price in advance or subsequently by entering into some binding agreement as to the sum to be paid, the defendant had lost its right to throw the plaintiff into court as to that item. Its allowance and payment, therefore, could not constitute a good consideration for the alleged accord and satisfaction.

Judge Wallace, in his opinion, said:

"The Referee found, as conclusions of law: (1) That at the time of signing the receipt the plaintiff was not indebted to the defendant upon the item for nutlocks; (2) that the plaintiff was not liable for the item of $40,000 debited to him for failure to complete the railroad by June 1st, 1887; (3) that when it rendered the statement of account the defendant was indebted to the plaintiff in the sum of $49,558.63, in addition to the sum of $173,532.49 paid by it upon receiving the receipt; (4) that the delivery of the receipt and the acceptance of the payment by the plaintiff did not constitute a valid payment or accord and satisfaction of the said sums of $9,558.63 and $40,000, or either of them, or any part of them; and that the plaintiff was entitled to recover the sum of $49,558.63, with interest from March 9th, 1888. The assignments of error thus raised the question whether the acceptance of $173,532.49 by the plaintiff upon a promise to receive it in full of all his demands was a settlement and satisfaction of his demands against the defendant, which amounted to $49,558.63 more than that sum. If there was no consideration for his promise, the conclusion of the Referee was correct. If there was a sufficient consideration for it, the assignments of error are good. * * * It is conceded that, as to the part of the plaintiff's demand established by the certificate of the engineer, it was a liquidated and undisputed demand against the defendant in the sense in which these terms are used in considering the validity of a promise to accept a part payment in satisfaction of the whole demand.

The other part of the plaintiff's demand that for the materials, etc., purchased of plaintiff by defendant was, according to the Referee's finding, undisputed in fact between the parties, and this being so, it is quite unnecessary to inquire whether it was originally one in respect to which there might have been a fair difference of opinion between the parties as to the amount due.

The statement of account rendered by the defendant is evidence as against the defendant not only that it was an undisputed demand, but one the amount of which had been ascertained by the parties. If the amount had been ascertained, it was a liquidated demand. As no facts appear in the findings of the Referee to the contrary, it is to be concluded that this part of the plaintiff's demand was also liquidated as well as undisputed by the defendant. The case is not precisely one where the debtor refuses to pay the whole of an undisputed and liquidated demand, and exacts a promise from his creditor to receive part in satisfaction of the whole. Strictly it is one where the creditor having two undisputed and liquidated demands against the debtor, and the latter claiming to have cross demands or counterclaims against the creditor, refuses to pay the creditor's demands unless the validity of the cross demands is acknowledged and their amount allowed to him by the creditor. By the statement of account and the receipt annexed to it the defendant, in fact, took this position and notified the plaintiff that as a condition to paying the demands which it conceded to be due the plaintiff, the latter must allow and deduct the debited items for the nutlocks and the forfeiture. Upon this state of facts a promise to allow the whole amount of the cross demands has no consideration to sustain it, because, in contemplation of the law, no benefit could accrue to the promisor and no injury to the promisee.

The promisor derives no benefit, because he allows the whole; the promisee is not injured, because he relinquishes nothing."

It will thus be seen that both the Judges are entirely in accord as to the law applicable to the case, which, reduced to a concrete form, is simply that an agreement without consideration is *nudum pactum* and unenforcible.

It will also be seen that both of the Judges concur in the view that, as a matter of fact, there was no consideration for the release or discharge of his claims by the respondent.

SIXTH.—Upon the receipt, as an accord and bar to the respondent's recovery, the petitioner rested practically its entire defense.

When asked whether it was just and right that the respondent should be mulcted in the sum of $40,000 for not completing the road in time, when the conceded testimony showed and the Referee found that the fault was that of the petitioner in not obtaining rights of way, its only reply was, the respondent has lost his right to payment by reason of the receipt.

When asked whether it was just and reasonable, and whether there was any provision of the contract warranting it in taking from the respondent $9,558.23 for nutlocks, its only answer was, the receipt prevents the payment.

It was read, reread and read again at every stage of the trial, and it was claimed constantly by the petitioner that, no matter how just were the claims of the respondent, the receipt was a bar to them all.

It is claimed that the receipt stands as payment, though no payment has been made. That it stands for an account stated, though no account had been rendered and no statement made; that it stands for an accord and satisfaction without the slightest proof of either the accord or satisfaction.

The defense, it is submitted, is not a just one, and the Court below properly found that it also was not a legal one.

It is believed that this Court will have no difficulty in arriving at the conclusion that the rules of law were properly applied by the Court of Appeals to the facts found in this case.

Point IV.

None of the cases cited and relied upon by the petitioner conflicts with the decision in the case at bar.

The decisions of this Court in the cases of U. S. *v.* Child, 12 Wall., 232, and U. S. *v.* Adams, 7 Wall., 463, as well as the other cases in this Court, relied upon by the petitioner, were distinguished and held not applicable to the facts in this case, in the opinion of Judge Lacombe, as follows: "Analysis of the leading reported cases will show that although it is not always discussed in the opinion, a valuable consideration is found to be present wherever a defense of accord and satisfaction has been sustained. The brief filed by the learned counsel for plaintiff in error presents such a comprehensive selection of authorities that it will be sufficient to refer to its citations.

First to be considered is a group of decisions of the U. S. Supreme Court, where claimants for supplies furnished to the Government were held fore closed by receipt in full and acceptance of part of their original claims. It should be remembered that the U. S. Treasury pays only out of appropriations and upon audit. There being many claims for military stores furnished during the Civil War, Congress created a special board to pass upon their validity and amount. None was required to bring his claim before such board, but if he did, payment was at once secured to him of whatever amount the board might find due, out of a special appropriation made for that purpose. Payment on all of these claims out of the ordinary appropriations had been suspended by order of the Treasury Department. "From the time the Secretary issued his order suspending the payment, * * * they must be regarded as claims disputed (*i. e.*, the whole claim) by the Government; and unless the board had been constituted, could have been adjusted only by Congress or the Court of Claims" (7 Wall., 463). In all these cases the amounts paid in settlement were unliquidated, since but for the finding of the board, the Government could have litigated them all in good

faith, and in giving up resort to the Court, at the same time going to the expense of constituting a special tribunal to adjust the claims, and securing the more expeditious payment of what might be found due, there was certainly abundant consideration to sustain the settlement. U. S. *v.* Adams (1868), 7 Wall., 463; U. S. *v.* Child (1870), 12 Wall., 232; U. S. *v.* Justice (1871), 14 Wall., 15. In Sweeny *v.* U. S. (1872), 17 Wall., 77, the claim was clearly unliquidated as to every part of it, involving the question of reasonable compensation; a circumstance which appears from the opinion: "Enough appears to satisfy the Court that the charter party was superseded and that the claim, in fact, was for a *quantum meruit*, and as such that it was a proper subject of compromise." In U. S. *v.* Martin (1876), 94 U. S., 400, plaintiff, a laborer, claimed extra pay under some construction of the eight-hour law. He presented his claim to the auditor in 1873 and received $205, giving a receipt in full. He subsequently brought suit for the balance in the Court of Claims. The payment of the $205 was a sufficient consideration, since the entire claim was fairly disputable in the courts. In Baird *v.* U S. (1877), 96 U. S., 430, plaintiff had a contract with the Government to furnish certain locomotives. The stipulated price was, first, a fixed sum for each locomotive; second, any advance there might be, after a certain date, in cost of labor and materials; and third, any damages resulting from giving the Government's order preference over others. The fixed price had been claimed and the damages recovered by suit. The plaintiff presented a claim for $151,588 for entire advance in cost which was audited and allowed for $97,507, and plaintiff informed of the principles upon which the adjustment was made. He took draft for the amount and collected it. Held an accord and satisfaction. Manifestly every dollar of the claim of $151,588 was unliquidated and susceptible of liquidation only by consent of the Government or by the courts. Assent to an adjustment at $97,507 was a valuable consideration. Pray *v.* U. S. (1882), 106 U. S., 594, is not in point, and in Boofington *v.* Tuyes (1886), 120 U. S., 198, there was abundant consideration in the abandonment of a right to appeal. In Fire Ins. Assn. *v.* Wickham, 141 U. S., 579, premature payment was held a good consideration.

In Battle *v.* McArthur, 49 Fed. Rep., 715, plaintiff had a contract for grading a railroad, compensation was at fixed prices for the units of the different kinds of work done. There had been a long dispute as to the classification of hardpan by the engineers, *i. e.*, as to how many units of rock and earth excavation respectively should be paid for. After the work was done, and the amount of final estimate was being settled on, a conference was had, of which Thayer, J., says: "The percentage of loose rock excavation thus demanded was not allowed, but it caused the Chief Engineer to raise the classification some twenty per cent., and that increased entered into the final estimate." Here was a concession and payment which certainly constituted a good consideration."

Every one of the decisions in the various States, cited upon the petitioner's brief in the Court below was also carefully examined and distinguished.

In every one of those cases, as pointed out in the opinion of the Court below, *some consideration was present* either by the giving up of some right which the debtor had or the acceptance by the creditor of some benefit which he would not have received, except for the settlement and compromise made.

Thus it will be seen that the Court below fully recognized the rule of law that the settlement and adjustment of a claim upon a consideration, would be a bar to further recovery by the creditor against the debtor.

While recognizing this rule, they held that the facts found by the Referee showed that there has been no accord and satisfaction between the parties, *because no consideration for the release of any claim passed from the petitioner to the respondent.*

Point V.

The fact that only two Judges composed the Court rendering the decision sought to be reviewed is no ground for the issuance of a writ by this Court.

It is not claimed by the petitioner that any request for a full Bench was made. If it had been, the request undoubtedly would have been granted. The petitioner took the risk and saw fit to argue the case before two Judges.

As already said, the Judges in no way differ as to the law applicable to the facts found by the Referee.

In the opinion of Judge Wallace, the finding of the Referee that the claim for materials purchased of the respondent by the petitioner was undisputed in fact between the parties, made it unnecessary to inquire whether it was originally one in respect to which there might have been a fair difference of opinion between the parties as to the amount due, and that the statement of account rendered by the petitioner was evidence as against the petitioner not only that it was an undisputed demand, but one the amount of which had been ascertained by the parties, and that if the amount had been ascertained, it was a liquidated demand.

See Opinion of Judge Wallace.

Judge Lacombe, in his opinion, inclined to the view that it was not necessary even to go to the extent indicated by Judge Wallace, but that the finding of the Referee that the receipt contained a "truthful, accurate and *undisputed* account" showed that he was evidently satisfied from the testimony that the prior transactions between the parties were such that the sum of $34,598.90 was

not more open to dispute than was the sum of $3,895,798.79, to which the Chief Engineer had certified; that the finding must be taken as conclusive upon the question and assumed that either by agreeing for a price in advance or subsequently by entering into some binding agreement as to the sum to be paid the petitioner had lost its rights to throw the respondent into court as to that item.

See Opinion of Judge Lacombe.

Both of the learned Judges agreed in the conclusion that there was no consideration for the alleged accord and satisfaction.

Point VI.

The application for the writ of certiorari should be denied.

Respectfully submitted.

KELLOGG, ROSE & SMITH,
Attorneys for the Respondent,
120 Broadway,
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ABRAM J. ROSE,
Of Counsel.

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[illegible]

[illegible]

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899,

No. 256.

CHICAGO, MILWAUKEE and ST. PAUL RAILWAY COMPANY,

Petitioner,

against

HEMAN CLARK,

Respondent.

BRIEF FOR RESPONDENT.

Statement.

This case comes before this Court upon a writ of certiorari to the Circuit Court of Appeals of the United States for the Second Circuit to review an order of said Circuit Court of Appeals affirming a judgment entered upon the report of a referee for $88,084.86 by the Circuit Court of the United States for the Southern District of New York in an action brought by Heman Clark, as plaintiff, against the Chicago, Milwaukee and St. Paul Railway Company, defendant.

See Judgment, pages 229-230.
See Order of Circuit Court of Appeals.
See Writ of Certiorari.

This action was brought to recover on six different causes of action.

1st. To recover under a written contract entered into between the plaintiff and the defendant a balance unpaid of $71,057.63.

2d. To recover upon *quantum meruit* the sum of $127,652.81 for work done in excess of that called for by the contract and which was not ordered under the terms of the contract in writing.

3d To recover damages for freight paid to avoid delays, the sum of $2,196.

4th. To recover the sum of $127,652.81 for fraudulent representations made by the defendant as to the quantity of work to be done under the contract.

5th. To recover the value of timber converted by the defendant to its own use, the sum of $2,425.

6th. To recover for damages and increased cost occasioned by the giving of wrong grades, the sum of $89,833.33.

By consent of the attorneys for the plaintiff and and the defendant, an order of reference was entered on the 19th day of October, 1894, referring all the issues in this action to William G. Choate, as Referee, to hear and determine the same.

See Order of Reference, pp. 45 and 46.

The Referee appointed by that order having declined to serve, an order was entered on the 3d day of January, 1895, ordering that George Hoadly be substituted as Referee in the place and stead of said William G. Choate, and that "this action, and all the issues therein, be, and the same hereby are, referred to the said Hon. George Hoadly, as sole Referee, to hear and determine the same."

See Order, pp. 47-48.

The case came on for trial before the said Referee, and a judgment was rendered by him in favor of the plaintiff and against the defendant for the sum of $80,479.35, with interest and costs.

A motion for a new trial under the rule adopted February 5th, 1877, in the Southern District of New York, was made by the defendant and overruled, and the report of the Referee confirmed by Judge Addison Brown.

Judgment was entered upon the report of the Referee on the 6th day of April, 1898, in favor of the plaintiff, for the sum of $88,084.86.

See Judgment, pp. 229-230.

A writ of error was sued out by the defendant to review the judgment entered, by the Circuit Court of Appeals for the Second Circuit, which Court affirmed the judgment.

The defendant then petitioned this Court for a writ of certiorari, which was granted, and, in pursuance of said writ, this case now comes before this Court.

Pleadings.

The only items allowed by the Referee in this case were the sum of $40,000, deducted by the defendant from the balance due the plaintiff as overtime penalty for the alleged non-completion of the contract within the time stipulated; the sum of $9,558.63, deducted by the defendant for nutlocks furnished by it to plaintiff and used by him in the construction of the road, and the item of $2,425 for timber belonging to the plaintiff, converted by the defendant to its own use.

It is only necessary, therefore, to call the Court's attention to the causes of action embracing these

three items, to wit, the first and fifth causes of action.

For a first cause of action the complaint alleges the making of a contract between the plaintiff and the defendant on the 6th day of March, 1896, for the building of a line of railroad for the defendant, extending from a point in the City of Ottumwa, Iowa, to Harlem Station, in Clay County, Missouri, a total distance of 202.8 miles, in accordance with the plans, profiles and specifications made by the chief engineer of the defendant and under his supervision and direction.

That for the work provided to be done under said contract, the defendant agreed to pay the sum of $3,954,600, subject, however, to the right of deduction of $50,000 by the defendant for transportation as provided in said agreement.

That the plaintiff proceeded to execute and perform said contract and prior to the commencement of this action had fully completed and performed the same so far as permitted by the said defendant and excepting such portions as were not required by it to be done thereunder.

That the said work had been accepted by the defendant and its Chief Engineer, who had certified to the proper performance thereof, and that the amount earned thereunder, after deducting the price of work not done and adding thereto certain allowances and rebates, as agreed upon, was the sum of $3,930,397.69/100.

That there had been paid on account of said contract the sum of $3,859,340.06/100, leaving a balance due of $71,057.63/100.

See Amended Complaint, pages 32-33, folios 95-99.

For a fifth cause of action, the complaint alleges that the plaintiff was the owner of 97,000 feet B.

M. of bridge timber of the full and reasonable value of $2,425, which said timber had been brought and placed upon the line of the work for his use in completing the said contract.

That the defendant, without the knowledge and consent of the plaintiff, took possession of the same and converted it to its own use, to his loss and damage in the sum of $2,425.

See Amended Complaint, page 36, folio 107.

The answer of the defendant,—

1st. Admits the making of the contract and the commencement of the performance thereof and its acceptance by the defendant and its Chief Engineer.

2d. Denies the amount earned and the balance alleged to be due thereunder.

It then sets up the following affirmative defenses:

1st. That under the provisions of the contract, the Chief Engineer had certified for the work done thereunder, that the plaintiff was entitled to $3,895,798.79, from which the defendant claimed the right to deduct for transportation, the sum of $50,000; and the further sum, by way of forfeiture for non-completion in the contract time, the sum of $40,000; and that it had paid to the plaintiff, in money, material, labor and transportation, a sum in excess of the amount certified.

2d. That subsequent to the making of the final certificate by the chief engineer and upon March 9th, 1898, an account was stated and agreed to between the parties as the amount earned and the amount to be credited for payment under the contract, and the balance due the plaintiff was fixed at

the sum of $173,532.49, which said sum was paid by the defendant and received by the plaintiff.

3d. That on the 9th day of March, 1888, the plaintiff acknowledged in writing that he had received payment of said sum of $173,532.49 in full satisfaction of all claims and demands of every kind, name and nature arising from or growing out of said contract, except the sum of $40,000 retained for future payments, and executed a receipt and acknowledgment for the same.

That the said sum of $40,000 so retained had been paid by the defendant for the purposes certified in said receipt and agreement, and the sum of $521.75 in excess thereof, for which sum an affirmative judgment was demanded.

See Amended Answer, pages 20 to 30, folios 60 to 88.

The reply of the plaintiff is a general denial of all the facts stated in the amended answer constituting a counterclaim.

See Reply, page 19.

To state the issues more briefly: The plaintiff under his first cause of action claims the sum of $71,057.63 as a balance due under the contract, together with the sum of $2,425 the value of timber belonging to him and taken and used by the defendant.

The defendant practically admits performance of and compliance with the terms of the contract, but sets up the following affirmative defenses:

1st. Payment in full.

2d. An agreement giving it the right to charge the plaintiff with the sum of $40,000 forfeiture or

damages for not completing the contract within the contract time.

3d. An account stated between the plaintiff and the defendant whereby a balance was found which has been paid.

4th. A plea of accord and satisfaction growing out of the execution of a receipt in full.

5th. The payment of the sum of $40,000 retained by the defendant for specific purposes and the sum of $521.75 in excess thereof.

Facts.

On March 6th, 1896, a written contract was entered into between the defendant, the Chicago, Milwaukee, and St. Paul Railway Company, and Heman Clark, the plaintiff, wherein and whereby it was agreed that said Clark should construct and fully complete, ready for rolling stock, a line of railroad for the defendant from Ottumwa, Iowa, to Harlem Station (afterwards changed to Randolph's Bluff), Clay County, Missouri, a total distance of 202.8 miles.

The work so to be done was to be in accordance with the plans, profiles and specifications made, or thereafter to be made, by the chief engineer of the defendant, and under his supervision and direction and to his satisfaction.

The price originally bid for the work was $3,990,000, but was afterwards adjusted at the rate of $19,500 per mile, which is $3,954,600 and almost equal to a deduction of $40,000 from the original bid.

The contract price inserted in the contract prior to its execution by the plaintiff was $3,914,600 and the contract was signed in that condition by the defendant.

But the plaintiff discovered the error and by consent of the defendant the lump sum to be paid was fixed at $3,954,600 before execution by the plaintiff.

The contract originally provided that the work should be completed by the 1st day of August, 1887.

The Referee, however, found that that provision was modified by a supplemental agreement to the effect that if the railroad was not completed by the 1st day of June, 1887, a forfeiture of $40,000 from the contract price should be imposed upon the plaintiff.

The finding of the Referee was not based on a written agreement between the parties, but upon correspondence testified to at the trial, which the defendant claimed established a contract.

The only evidence of the plaintiff's assent was parol evidence as to a telegram claimed to have been sent by him, which had been lost, and as to which there was no proof that he had sent it or authorized its sending. The plaintiff expressly denied that he had sent it or authorized it.

But whether the agreement to forfeit $40,000 was made or not, the evidence conclusively shows and the Referee expressly found that the failure to complete by the 1st day of June, 1887, was wholly due to the failure of the defendant to provide the rights of way so as to enable the plaintiff to complete his work.

See Referee's Findings, p. 112, fols. 335–336.

The obligation to furnish rights of way was expressly imposed upon the defendant as a condition to be performed by it.

The contract provides "For and in consideration "of the payments, covenants and agreements of

"the party of the second part to be by said "second party made, kept and performed as here- "inabove set forth, the party of the first part here- "by covenants and agrees to furnish, at his own "cost and expense, and at such time or times as "not to delay the execution of the work in this "agreement mentioned and referred to, all the "lands now or hereafter marked out and desig- "nated by the said first party's chief engineer for "right of way, borrow pits, waste banks and sta- "tion grounds of all kinds as the said lands may be "required for the construction of the railroad cov- "ered by this agreement."

See Contract, p. 169, fol. 506.

The plaintiff continually called upon the defendant to furnish rights of way, but it failed to do so.

The testimony shows that there were twenty-five places where, until after June 1, 1887, the rights of way had not been procured.

At a place called Minneville the right of way, for a distance of 2,750 feet, was not procured until October 27, 1887.

Testimony Hegeman, p. 239.

The next day, after the final right of way had been furnished, the contract was completed, and the first train ran over the line on November 1, 1887.

See testimony of Russell, p. 378, fol. 1133.

After the completion of the work, in accordance with the terms of the contract, the Chief Engineer of the defendant made a final certificate, bearing date March 3d, 1888, which was presented to it but not to the plaintiff.

By that certificate the Engineer certified that it was a final estimate of the amount and value of the work done and materials used by plaintiff in building the railroad, including all extra work done by him, and that the said railroad agreed to be built had been "constructed, built, completed and fin-" ished, in all respects, in conformity with the " agreements of said contract, except as the said " Railroad Company, party of the first part, has, " by agreement with said Clark, assumed the con-" struction and completion thereof."

He then certified the amount due:

As per contract price,	$3,954,600 00
From which deductions were made by him amounting to	104,372 77
Leaving a balance of	$3,850,227 23
To which he added for items not covered by contract, etc.;	45,571 56
Making a total due to the plaintiff,	$3,895,798 79
See Certificate, pp. 197–203.	
To this amount, as certified by the engineer, the defendant credited the plaintiff for materials sold by him to it, and for certain rebates and other matters, the sum of	34,598 90
Making the sum of	$3,930,397 69

There was no dispute in this case, but that this amount due the plaintiff was never fully paid to him, unless by the transactions evidenced by a receipt signed by him on March 9th, 1888. THIS RECEIPT, IT APPEARS, WAS SIGNED IN NEW YORK BY THE PLAINTIFF BEFORE HE HAD RECEIVED OR SEEN THE CERTIFICATE MADE UP BY THE CHIEF ENGINEER, AND BEFORE HE HAD RECEIVED ANY FINAL ACCOUNT OF THE ITEMS MENTIONED IN THE

RECEIPT OR HAD ANY KNOWLEDGE OF THEIR CORRECTNESS.

The first time that the final estimate of the Engineer was seen by Mr. Clark was upon the trial of this action before the Referee. It had been delivered to the defendant, and with the final accounts had been sent by the president of the defendant to Mr. Bond, its vice president, who had an office in New York. Mr. Bond simply sent the receipt with the check for the balance shown by the receipt to the plaintiff, and did not forward the final accounts nor the Engineer's certificate. This was expressly admitted by Mr. Bond on the trial.

This receipt, it was claimed by the defendant, was a bar to any recovery by the plaintiff in this action for any claims.

The plaintiff, on the other hand, claimed that it was no bar, because the difference between the amount earned and the amount paid, amounting to $71,057.63, had never been released or discharged by him and was still due and owing.

This sum of $71,057.63 was claimed by the plaintiff in his first cause of action and is made up of the following items:

1st. Deductions made by defendant for nut locks furnished by it to plaintiff and used by him in the construction of the road, and for which the defendant rendered bills, from time to time, the amount not being questioned only the liability.....	$9,558 63
2d. Deductions made by defendant for non-completion of the railroad on the first day of June, 1897, in accordance with an alleged supplemental contract entered into between the parties.....	40,000 00

3d. Deductions made for moneys paid to subcontractors without right, including the moneys paid in compensation for the death of a brakeman during construction, in all.....	21,499 00
Making a total of.....	$71,057 63

Of these amounts the Referee has refused to allow the defendant:

1st. The deduction for nut locks....	$9,558 63
2d. The deduction for the forfeiture withheld by the defendant for not completing in time.....	40,000 00

The amount retained as payment for the nut locks does not appear specifically in the receipt, but it is included in the sum of $3,626,865.20, claimed to have been paid by the defendant on account of the contract.

This was expressly so found by the Referee.

See Findings, p. 113, fol, 339.

The $40,000 appears specifically as deducted in the receipt.

The only defense to the recovery of these items by the plaintiff was the interposition by the defendant of the receipt as a bar.

The only other item allowed for by the Referee in this case was the claim of the plaintiff under his fifth cause of action, to wit: $2,425 for timber belonging to him converted by the defendant to its own use.

All the other causes of action aggregating $232,489.49 have been disallowed by the Referee.

The claims under those causes of action were for increased cost occasioned to the plaintiff in the prosecution of the work by the wrongful act and fault of the defendant, its servants and agents, in

giving him wrong grades and in compelling him to do more work than required by the terms of the contract and in a more expensive manner.

As to the items allowed there is no claim or pretense of payment, except as evidenced by the receipt.

It will be argued by the plaintiff:

1ST. THAT THERE IS NO QUESTION OPEN FOR REVIEW BY THIS COURT BECAUSE THIS CASE IS A COMMON LAW ACTION, AND WAS NOT TRIED BY A JURY, NOR BY THE COURT WITHOUT A JURY, UNDER THE PROVISIONS OF SECTIONS 649 AND 700 OF THE REVISED STATUTES OF THE UNITED STATES, BUT THAT THE JUDGMENT RENDERED WAS UPON THE DECISION OF A REFEREE ACTING AS A COMMON LAW ARBITRATOR.

2D. THAT EVEN IF THE JUDGMENT RENDERED BE CONSIDERED IN ANY SENSE A JUDGMENT UPON A TRIAL BY THE COURT, THE ONLY QUESTION WHICH BY ANY POSSIBILITY CAN BE PRESENTED TO THIS COURT IS WHETHER THE FACTS FOUND BY THE REFEREE SUPPORT THE JUDGMENT RENDERED.

3D. THAT THE JUDGMENT RENDERED IS FULLY SUPPORTED BY THE FACTS FOUND BY THE REFEREE.

4TH. THAT THE RECEIPT OFFERED IN EVIDENCE BY THE DEFENDANT IS NOT A BAR TO THE RECOVERY OF THE PLAINTIFF FOR THE TWO ITEMS ALLOWED BY THE REFEREE UNDER THE FIRST CAUSE OF ACTION.

5TH. THAT EVEN IF THIS COURT WERE AT LIBERTY TO REOPEN AND REEXAMINE ALL THE FINDINGS OF FACT MADE BY THE REFEREE THE EVIDENCE TAKEN UPON THE TRIAL NOT ONLY FULLY SUPPORTS THOSE FINDINGS IN EVERY PARTICULAR, BUT CONTRARY FINDINGS WOULD BE AGAINST THE WEIGHT OF EVIDENCE.

ARGUMENT.

Point I.

There is no question open for review by this Court, because this case is a common law action and was not tried by a jury nor by the Court without a jury under the provisions of Sections 649 and 700 of the Revised Statutes of the United States, but before a referee acting as a common law arbitrator.

1ST. THIS ACTION WAS A COMMON LAW ACTION TO RECOVER A SUM OF MONEY CLAIMED TO BE DUE to THE PLAINTIFF UNDER AND BY VIRTUE OF A CONTRACT MADE AND ENTERED INTO BETWEEN HIM AND THE DEFENDANT, AND FOR DAMAGES BY REASON OF THE WRONGFUL ACTS OF THE DEFENDANT, ITS SERVANTS AND AGENTS, IN THE PROSECUTION OF THE WORK.

On the 19th day of October, 1894, the following stipulation was made by the attorneys for the parties:

> "It is hereby stipulated and agreed that "the above-entitled action and all the issues "therein be referred to the Hon. William G. "Choate, AS SOLE REFEREE TO HEAR AND DE-"TERMINE THE SAME. It is further stipulated "and agreed that judgment upon the Report "of such Referee shall not be entered here-"in until after ten days' notice of the filing "of the report of the Referee and of the "judgment proposed to be entered thereon "shall have been given to the opposite "party."

See Stipulation, page 46.

On this consent an order was entered on the said day referring this action to Hon. William G. Choate AS SOLE REFEREE TO HEAR AND DETERMINE THE SAME.

See Order, page 45.

Mr. Choate declined to serve as Referee, and subsequently an order was entered on the 3d day of January, 1895, in which the previous order was recited, and the Hon. George Hoadly was appointed Referee in this action in his place and stead.

The only consent to the entry of the second order was the stipulation appended to it to the effect that the parties consented to the entry of the order.

See Order, pages 47 to 48.

It was under this second order that the trial of this action was had and the decision upon which the judgment in this action was entered was rendered.

The defendant, in order to avoid the binding effect of the decision and, if possible, to obtain a review of the judgment, moved for a new trial under the rule of the Circuit Court in the Southern District of New York, passed February 5th, 1877, before Hon. Addison Brown, prior to the entry of the judgment. On the 6th day of April, 1898, a judgment or decision was signed by Judge Brown overruling the motion and adopting the findings and rulings of the Referee as the findings and rulings of the Court.

This decision was simply formal on the part of the Court, without a re-examination of the questions involved, and upon the approval as to form by the attorneys for both parties.

See Decision, pages 221–226.

This confirmation, if it may be so called, by the Court, however it is submitted, was not sufficient to open any question for review by this Court.

As said by the Circuit Court of Appeals:

> "Great embarrassment results to the de-
> "feated party where a Referee appointed by
> "consent, in conformity to the State Code
> "of Procedure, has made his Report, and
> "the Court has entered judgment thereon;
> "*nor has the existing difficulty been substan-*
> "*tially overcome by the rule adopted by the*
> "*three federal districts of this State pro-*
> "*viding for motion for a new trial.*
>
> "In view of the decisions, it is rather sur-
> "prising that parties to common law actions
> "in the Circuit Court consent to such refer-
> "ences."
>
> Parker *v.* Ogdensburgh and L. C. R. Co., 79 Fed. Rep., 818–819.

Has, then, the defendant overcome the difficulty in this case and is its procedure sufficient to open for review any question whatsoever on this appeal?

Second.—THE TRIAL OF THIS ACTION WAS NOT HAD BEFORE A JURY, NOR BY THE COURT WITHOUT A JURY, IN ACCORDANCE WITH SECTIONS 649 AND 700 OF THE REVISED STATUTES.

1st. By Section 649 of the Revised Statutes it is provided:

> "Issues of fact in civil cases in any Circuit
> "Court may be tried and determined by the
> "Court without the intervention of a jury
> "whenever the parties or their attorneys of
> "record file with the clerk a stipulation in

" writing waiving a jury trial. The finding
" of the Court upon the facts, which may be
" either general or special, shall have the
" same effect as the verdict of a jury."

And by Section 700 it is provided:

" When an issue of fact in any civil
" cause in a Circuit Court is tried and
" determined by the Court without the
" intervention of a jury, according to Sec-
" tion 649, the rulings of the Court in the
" progress of the trial of the cause, if ex-
" cepted to at the time, and duly presented
" by a bill of exceptions may be reviewed by
" the Supreme Court upon a writ of error or
" upon appeal, and when the finding is
" special the review may extend to the deter-
" mination of the sufficiency of the facts
" found to support the judgment."

See Revised Statutes, Section 700.

The jurisdiction of the Circuit Court of Appeals to review a judgment entered in a case tried in a Federal Court otherwise than according to the strict course of the common law, is limited to cases tried in accordance with the sections above quoted.

Merrill *vs.* Floyd, 53 Fed. Rep., 172.

2d. THE CASE AT BAR WAS TRIED BY A REFEREE ACTING AS A COMMON LAW ARBITRATOR.

To quote Mr. Justice GRAY:

" Before the passage of this statute it had
" been settled by repeated decisions that in
" any action at law in which the parties
" waived the trial by jury, and submitted
" the facts to the determination of the Cir-
" cuit Court upon the evidence, its judgment

" was valid, but that this Court had no
" authority to revise its opinion upon the ad-
" mission or rejection of testimony, or upon
" any other question of law growing out of
" the evidence, and therefore when no other
" error appeared on the record, must affirm
" the judgment."

Bond *v.* Dustin, 112 U. S., 604.

The reasons for this were given by Chief Justice Taney in Campbell *vs.* Boyreau, 21 How., 223.

In that case, which was an action of ejectment, the parties agreed to waive a trial of the facts by jury, and that the facts as well as the law should be decided by the Court upon the evidence adduced by the parties.

Evidence was offered on both sides, and the Court proceeded to decide the facts in dispute and the questions of law arising upon the facts so found, and gave judgment against the plaintiffs in error, who were defendants in the Court below.

The Chief Justice said:

"It appears by the transcript that several
" exceptions to the opinion of the Court were
" taken at the trial by the plaintiffs in error—
" some to the admissibility of evidence, and
" others to the construction and legal effect
" which the Court gave to certain instru-
" ments of writing. But it is unnecessary to
" state them particularly, for it has been re-
" peatedly decided by this Court, that, in the
" mode of proceeding which the parties have
" seen proper to adopt, none of the questions,
" whether of fact or of law, decided by the
" Court below, can be re-examined and re-
" vised in this Court upon a writ of error. * * *
" Indeed, under the acts of Congress estab-
" lishing and organizing the Courts of the

" United States, it is clear that the decision " could not be otherwise; for, so far as ques- " tions of law are concerned, they are regu- " lated in their modes of proceeding accord- " ing to the rules and principles of the com- " mon law, with the single exception of the " Courts in the State of Louisiana, of which " we shall presently speak. And by the " established and familiar rules and prin- " ciples which govern common law proceed- " ings, no question of law can be reviewed " and re-examined in an Appellate Court " upon writ of error (except only where it " arises upon the process, pleadings or judg- " ment in the cause), unless the facts are " found by a jury, by a general or special " verdict, or are admitted by the parties, " upon a case stated in the nature of a special " verdict stating the facts, and referring the " questions of law to the Court.

" The finding of issues in fact by the Court " upon the evidence is altogether unknown " to a common-law Court, and cannot be " recognized as a judicial act. Such ques- " tions are exclusively within the province " of the jury; and if, by agreement of par- " ties, the questions of fact in dispute are " submitted for decision to the Judge upon " the evidence, he does not exercise judicial " authority in deciding, but acts rather in " the character of an arbitrator. And this " Court, therefore, cannot regard the facts " so found as judicially determined in the " Court below, nor examine the questions of " law, as if those facts had been conclusively " determined by a jury or settled by the ad- " mission of the parties. Nor can any ex- " ception be taken to an opinion of the Court " upon the admission or rejection of testi-

" mony, or upon any other question of law
" which may grow out of the evidence, unless
" a jury was actually impaneled, and the ex-
" ception reserved while they were still at
" the bar. The statute which gives the ex-
" ception in a trial at common law gives it
" only in such cases. And as this Court can-
" not regard the facts found by the Judge as
" having been judicially determined in the
" Court below, there are no facts before us
" upon which questions of law may legally
" and judicially have arisen in the inferior
" Court, and no questions, therefore, open to
" our revision as an appellate tribunal. Con-
" sequently, as the Circuit Court had juris-
" diction of the subject matter and the par-
" ties, and there is no question of law or fact
" open to our re-examination, its judgment
" must be presumed to be right, and on that
" ground only affirmed."

Campbell *v.* Boyreau, 18 How., 135.
Kelsey *v.* Forsyth, 21 How., 85.

In the absence, then, of a trial by the Court without a jury, as provided in Section 649 of the Revised Statutes, AS THE FACTS FOUND BY A REFEREE CANNOT BE TAKEN INTO CONSIDERATION BY THE APPELLATE COURT, THERE IS NOTHING UPON WHICH THEY CAN MAKE A REVIEW AS TO WHETHER OR NOT THE JUDGMENT RENDERED BY HIM IS IN ACCORDANCE WITH LAW.

In other words, the Appellate Court is precluded from making any examination whatsoever, of the record and no question is open to it for review, either upon the facts or upon the law.

That the statute, Section 649, in no way changed the rule of law stated in the decision before the passage of the statute, has been expressly held by this Court.

Mr. Justice Miller, writing the opinion for the Court, said:

> "The Judiciary Act of 1789, Section 12, "declares that the trial of issues in fact in "the Circuit Courts shall in all suits, except "those of equity and of admiralty and maritime jurisdiction, be by jury. * * * Numerous decisions, however, had settled that "this right to a jury trial might be waived "by the parties, and that the judgment of "the Court in such cases should be valid. "* * * But as was shown in the recent "case of Flanders *v.* Tweed, 9 Wallace, 425, "this Court had held that no review of the "decision of the Court below could be had "of any ruling at the trial where the parties "had consented to accept the Court instead "of a jury to decide issues of fact."

The learned Justice then refers to the passage of the Act of 1865, and continues:

> "The question arises on this statute "whether the mode of submitting a "case to the Court without a jury "was intended to be exclusive of all "other modes, so that if there is no "stipulation in writing, waiving a jury, there "is error for which the judgment must be "reversed. Although the language of the "Section might admit of that construction, "it is not the only one of which it is susceptible. As said in the case already referred "to of Flanders *vs.* Tweed, the main purpose "of the act undoubtedly was to enable the "parties who were willing to waive a jury "to have the case reviewed on writ of error "when tried by the Court alone. This was "rendered necessary, as shown by Mr. Justice Nelson in the opinion in that case, by

" the former decisions based on the idea that
" in such cases, the Court did not sit as a
" Court of law, but as *quasi* arbitrators. To
" remove this difficulty, the statute provided
" a mode by which the parties who agree to
" waive a jury should have the benefit of a
" writ of error to the rulings of the Court on
" questions of law. * * * We cannot be-
" lieve that Congress intended to say that
" the parties shall not, as heretofore, sub-
" mit their cases to the Court unless they do
" so by a written stipulation, but that it was
" the intention to enact that, if parties who
" consent to waive a jury desire to secure the
" right to a review in the Supreme Court of
" any question of law arising in the trial,
" they must first file their written stipula-
" tion, and must then ask the Court to make
" a finding of such facts as they deem essen-
" tial to the review, and ask the ruling of the
" Court on points to which they wish to ex-
" cept. If this is not done, the parties con-
" senting to waive a jury stand as they did
" before the statute concluded by the judg-
" ment of the Court on all matters submitted
" to it."

Kearney *vs.* Case, 79 U. S., 275.

BY THIS DECISION, THEREFORE, IT MUST BE HELD THAT THERE STILL EXISTS THE RIGHT TO SUBMIT A CASE TO THE DECISION OF THE COURT OR A REFEREE ACTING AS ARBITRATORS, AND THAT THE DECISION RENDERED, WHILE IT IS BINDING UPON THE PARTIES, IS NOT SUCH A DECISION AS CAN BE REVIEWED ON APPEAL.

Third.—THE JUDGMENT RENDERED IN THE CASE AT BAR IS IN THE NATURE OF A COMMON LAW ARBITRATION.

The consent by which the action was referred provides that all the issues be referred to Honorable George Hoadly "AS SOLE REFEREE TO HEAR AND DETERMINE THE SAME." This was a complete submission of the entire case both upon the facts and the law to his decision.

It was in no sense a trial by the Court without the intervention of a jury, as provided by Section 649, because it was a trial by a Referee, and, under the decisions above quoted, this Court cannot regard the facts found by him as judicially determined in the Court below. Nor can it examine any questions of law, BECAUSE THERE ARE NO FACTS BEFORE IT UPON WHICH QUESTIONS OF LAW MAY LEGALLY AND JUDICIALLY HAVE ARISEN IN THE INFERIOR COURT, and, therefore, open to revision by this Court as an appellate tribunal.

Fourth.—NOR DID THE SO-CALLED CONFIRMATION OF THE REPORT BY JUDGE BROWN AND THE ADOPTION BY HIM OF THE FINDINGS OF THE REFEREE AS THE FINDINGS OF THE COURT, BRING THIS CASE WITHIN THE PROVISIONS OF SECTION 649 FOR TWO REASONS:

1st. Because there has been no trial by the Court of the issues in this action, but simply an adoption of the findings of the Referee entered by consent of the parties and without a re-examination or retrial before the Court.

2d. Because there was no written stipulation filed with the clerk waiving a jury and consenting to a trial by the Court.

(A). The consent referring this case provided in accordance with the rule in the Southern District of New York that after decision by the Referee, no judgment should be entered "until after ten

days' notice of the filing of the report of the Referee and of the judgment proposed to be entered thereon shall have been given to the opposite party."

See Stipulation, page 46.

After the rendering of the Referee's Report, and prior to the entry of the judgment, the defendant made application to the Court for a new trial and an arrest of the judgment, as provided by the rule. Judge Brown, *upon consent of the parties*, signed a decision which appears at page 221 of the record. It was simply a formal decision overruling the motion on behalf of the defendant for a new trial and for an arrest of the judgment and adopting the findings of the Referee, both as to the facts and as to the law, as the findings and conclusions of the Court.

This certainly was not a trial before the Court without a jury, as contemplated or intended by Section 649 of the Revised Statutes.

(B). Even if it be considered such a trial, then there was no consent in writing filed with the clerk waiving a jury and to a trial by the Court without the intervention of a jury, as required by that section.

The only consent in writing was the consent referring the action TO THE REFEREE TO HEAR, TRY AND DETERMINE ALL THE ISSUES THEREIN.

In the decision signed by Judge Brown, the defendant attempted to conform to the provisions of Section 649 by inserting a statement to the following effect:

> "This cause coming on for trial and to be
> "held at a regular term of the Circuit Court
> "of the United States for the Southern Dis-
> "trict of New York, held at the United

"States Court House, in the city of New
"York, before the Hon. Addison Brown,
"District Judge, without a jury, and a trial
"by jury having been expressly waived by
"written consent of the parties duly filed
"with clerk of the Court, BY WHICH
"CONSENT ALSO IT WAS PROVIDED AND AGREED
"THAT THE HON. WILLIAM G. CHOATE
"SHOULD BE APPOINTED REFEREE TO HEAR
"AND DETERMINE THE SAID ACTION AND THE
"ISSUES THEREIN."

See Decision, page 221, folio 662.

While the decision recites that a jury trial was waived in accordance with Section 649, the very statement itself shows that that consent was the one referring the case to Hon. William G. Choate as Referee.

If, then, a trial by Referee is not considered a trial before the Court without a jury, certainly a consent referring an action to a Referee cannot be considered as the written stipulation required by Section 649 of the Revised Statutes consenting to a trial "*by the Court* without the intervention of a "jury whenever the parties or their attorneys of "record file with the clerk a stipulation in writing "waiving a jury."

In other words, a trial before a Referee cannot be deemed a trial by the Court, hence a consent referring the whole issues to a Referee cannot be considered as a consent to a trial by the Court.

But the proceeding had before Judge Brown, if in any sense it could be considered *a trial by the Court without a jury*, WAS WITHOUT ANY CONSENT OR STIPULATION AT ALL. The decision itself shows that the only consent given was the consent to refer the issues to the Referee.

It, therefore, follows:

1st. THAT IF THE JUDGMENT RENDERED IN THIS ACTION WAS NOT IN ACCORDANCE WITH THE PROVISIONS OF SECTION 649, IT WAS IN THE NATURE OF A COMMON LAW ARBITRATION AND UNDER THE DECISIONS OF THIS COURT NO QUESTION IS OPEN FOR REVIEW.

2d. THAT IF THE PROCEEDINGS HAD BEFORE JUDGE BROWN WERE EQUIVALENT TO A TRIAL BEFORE THE COURT, WITHOUT A JURY, THEN THERE WAS NO STIPULATION CONSENTING TO SUCH A TRIAL FILED WITH THE CLERK IN WRITING WAIVING A JURY UNDER THE PROVISIONS OF SECTION 649.

In either aspect of the case, there is no question open for review by this Court, and the parties "stand as they did before the Statute concluded by "the judgment of the Court on all matter submit-"ted to it."

Kearny *v.* Case (*supra*).

POINT II.

Even if the judgment rendered be considered in any sense a judgment upon a trial by the Court, the only question which by any possibility can be presented for review, is whether the facts found by the Referee support the judgment rendered.

THE WHOLE ISSUE IN THIS CASE, BOTH UPON THE LAW AND THE FACTS, WAS REFERRED TO THE REFEREE TO HEAR AND DETERMINE.

The proceedings before Judge Brown, as claimed under Point I, was simply a motion for a new

trial, under the rule in the Southern District of New York, and was in no sense a trial by the Court.

But, if that proceeding be considered such a trial, then this case is within that class of cases where the parties consent to a trial by the Court without filing a stipulation under Section 649; or where the Court refers the case to a Master or Referee to hear and report the evidence, and upon the coming in of the report adopts the findings of the Master or Referee as the findings of the Court and renders judgment accordingly; or where the consent is to a referee to hear and report to the Court; or where a partial reference may have been ordered.

In such cases it has been decided over and over again that the only questions before the appellate court are whether the facts found by the Referee sustain the judgment.

The appellate court cannot review exceptions to the admission or exclusion of evidence or to findings of fact by the Referee or to his refusal to find fact as requested.

Shipman *v.* Straitsville Central Mining Co., 158 U. S., 356.
Roberts *v.* Benjamin, 124 U. S., 64.
Boogher *v.* N. Y. Life Ins. Co., 103 U. S., 90.
Bond *v.* Dustin, 112 U. S., 604.
Paine *v.* Central Vermont R. R. Co., 118 U. S., 152.
Andes *v.* Slauson, 130 U. S., 435.

To the same effect are the decisions of the Circuit Court of Appeals in the various Circuits.

Shipman *v.* Ohio Coal Exchange, 70 Fed. Rep., 652.
Board of Commissioners *v.* Sherwood, 64 Fed. Rep., 103.
Abraham *v.* Levy, 72 Fed. Rep., 124.

Merrill *v.* Floyd, 53 Fed. Rep., 172.
Wesson *v.* Saline County, 73 Fed. Rep., 917.

In Shipman *v.* Straitsville Mining Company, this Court, speaking by Mr. Justice Brown, said:

> "This case was referred by consent to Mr. "Harrison, a so-called Master Commissioner, " as Referee, with instructions to report the " testimony with the findings of fact and of " law to the Court. The fact that no such " officer as 'Master Commissioner' is known " to the law does not impair the validity of " the reference, as it is perfectly competent " for the Court to refer a case to a private " person (Hecker *v.* Fowler, 69 U. S., 2 Wall. " 123). And as the Court in its judgment " ordered his findings to stand as the find- " ings of the Court, the only questions be- " fore this Court are whether the facts found " by the Referee sustained the judgment. " As the case was not tried before the Cir- " cuit Court upon a waiver in writing of a " trial by jury, this Court cannot review ex- " ceptions to the admission or exclusion of " evidence or to findings of fact by the " Referee, or to his refusal to find facts as " requested."

Shipman *v.* Straitsville Central Mining Co., 158 U. S., 356-361.

The only question, then, which by any possibility is open to this Court for review is whether the facts found by the Referee support the judgment rendered.

Point III.

The judgment rendered is fully supported by the facts found by the Referee.

Of the seventy seven assignments of error filed by the defendant in this case, it is submitted, only one, to wit, the Seventh, raises any question for examination by this Court.

The Seventh assignment of error is as follows:

> "That the said Circuit Court erred in "holding and deciding, upon the hearing "and trial of this action as aforesaid, that "the findings of fact made by the said Ref- "eree, as contained in his said report made "and filed in this action on the 18th day of "February, 1898, authorized said judgment "for the plaintiff."

See Assignments of Error, page 479.

This is the only assignment of error which raises any question as to a ruling and decision upon a matter of law *after the award of the Referee.*

First.—THE FINDINGS OF FACT BY THE REFEREE FULLY SUPPORT THE JUDGMENT RECOVERED BY THE PLAINITFF UPON THE FIRST CAUSE OF ACTION.

The balance claimed by the plaintiff to be due him from the defendant, amounted to $71,057.63.

It was reached in the following manner:

Amount earned under the contract, as shown by the engineer's certificate	$3,895,798 79
Amount credited by the defendant to the plaintiff for materials furnished	$34,598 90
Total	$3,930,397 69

From this there was deducted the following:		
Amount of payments.	$3,626,865 20	
Less nut locks charged.	$9,558 63	
Amount paid for dead brakeman.	1,999 00	11,557 63
Balance...		$3,615,307 57
Transportation		50,000 00
Final payment		173,532 49
Balance properly expended out of $40,000 retained		20,500 00 $3,859,340 06
Balance		$71,057 63

These amounts agree with the engineer's certificate and with the figures contained in the final receipt.

That balance was claimed by the plaintiff under a full compliance by him with the terms of the contract.

The defendant did not deny that that balance had been earned, but sought to avoid its payment by setting up various affirmative defenses, hereafter to be considered, under which it claimed the right to charge the plaintiff with the following items:

A penalty for not completing the contract on June 1st	$40,000 00
For patented nut locks furnished by the defendant to the plaintiff and charged to him	$9,558 63
Settlement of judgment of King &	

Wetherill against plaintiff's wish and without his consent.....	19,500 00
Paying damages for killing brakeman.	1,999 00
Total.....	$71,057 63

Of this balance of $71,057,63 claimed by the plaintiff, the Referee has allowed two items only:

1st. The amount deducted by the defendant, as liquidated damages, for non-completion of the contract on June 1st, 1888 .....$40,000 00

2d. The amount deducted by the defendant for patented nut locks furnished by the defendant to the plaintiff and charged to him 9,558 63

It will be only necessary then to consider the findings of fact by the Referee in reference to these two items.

(A). *As to the right of the defendant to deduct the $40,000 penalty, the Referee found the following facts:*

2

"That immediately after the execution of the "said contract, the plaintiff preceeded to carry out "and perform the same, and did carry out and per- "form the same, except a portion thereof, other- "wise agreed between the parties, and substantially "completed the same on or about the first day of "November, 1887, and the same was duly ac- "cepted by the defendant on or about the first day "of March, 1888."

5.

"That the consideration for the performance of "said contract originally mentioned in said con-

" tract was $3,914,600, but before the execution of " said contract by the plaintiff, by and with the " consent of the defendant, the consideration was " changed and made $3,954,600."

6.

" That the plaintiff made and entered into a sup- " plemental contract whereby he agreed with the " defendant to complete his performance of said " contract on or before June 1st, 1887, and to allow " the said defendant by way of forfeiture in case " the said railway were not so completed by the 1st " of June, 1887, the sum of $40,000."

7.

" That the defendant failed to furnish the plaintiff " with rights of way as by said contract it had " agreed to do in time to enable the plaintiff to " complete his contract prior to the 1st day of June, " 1887, or prior to the 1st of August, 1887, but on " the contrary, delayed the plaintiff in the perform- " ance of said contract at a point upon the said " road known as Minneville, until October 27th, " 1887, by reason of the neglect, failure and " omission of the defendant to obtain the neces- " sary right of way at said point so as to permit " the construction of the road and completion of " the contract at said point."

8.

" That the plaintiff was thereby prevented from " completing his contract on or prior to August 1st, " 1887, and also on or prior to June 1st, 1887, by " the negligence, omission and fault of the defend- " ant."

See Findings, pp. 111–112.

Here, then, is a conclusive finding by the Referee that the defendant failed in its obligation to furnish rights of way to the plaintiff to enable him to complete his contract within the contract time.

UPON THE FACTS SO FOUND, THE LEARNED REFEREE HELD AS CONCLUSIONS OF LAW:

1st. "That the defendant is not entitled to charge "the plaintiff or to retain and deduct from the "amount earned and payable to the plaintiff under "the said contract, the sum of $40,000 as a for- "feiture or liquidated damages for not completing "the contract upon June 1st, 1887."

2d. "That under the facts proved in this case, "the plaintiff is not legally liable to the defendant "for any damages for failure to complete the con- "tract within the contract time or the time agreed "upon for the reason that the plaintiff was pre- "vented by the negligence of the defendant and "its omission to procure the necessary right of "way completing the work in such time."

See Findings, pp. 117–118.

(B). *That the conclusions reached by the Referee are fully supported by the facts found by him is conclusively settled by the authorities.*

It is a well-settled rule that where one party demands strict performance as to time by another party he must perform on his part all the conditions which are requisite in order to enable the other party to perform his part, and a failure on the part of the party demanding performance to do the preliminary work required, in order to enable the other party to complete his within the time limited,

operates as a waiver of the time provision in the contract.

Dannat *v.* Fuller, 120 N. Y., 558.
Stewart *v.* Keteltas, 36 N. Y., 388.
Grube *v.* Schultheiss, 57 *id.*, 669.
Gallagher *v.* Nichols, 60 *id.*, 438.
Weeks *v.* Little, 89 *id.*, 566.

It is also well settled that after the failure to perform a condition precedent not only is the time limit in the contract broken, but that thereafter the other party has a reasonable time to perform.

In other words, after the failure to procure the rights of way either before June 1st or August 1st, the time limit was broken and the plaintiff had, for the performance of his contract, such reasonable time as might be proved to be necessary for the completion of his work.

In the present case there was no proof of what a reasonable time for completion would have been.

It should be sufficient for the Court to know that the entire work was substantially completed within a few days after the procuring of the last right of way.

This doctrine is well settled in our Courts.

"The time specified in the contract for performance had been abrogated and the obligation as to time no longer bound either party. Thereafter each party had a reasonable time in which to perform." Opinion, RAPALLO, J.

Lawson *v.* Hogan, 93 N. Y., 44.
Dady *v.* The Mayor, 57 Hun, 559.
Willis *v.* Webster, 1 App. Div., 301.

These cases were decided upon the authority of earlier authorities to the same point.

They are based substantially upon the doctrine that the extension of time in days covering periods

during the different seasons when the days are either short or long, clear or rainy, cannot be properly apportioned by the Court as between the parties.

This precise point was raised in a case in the New York Court of Appeals and was decided contrary to the defendant's contention

The Court says:

> "The contractor could gain nothing by "haste and pressure in one direction so long "as entire completion was delayed by his "employers. We cannot divide and appor- "tion the fault. It is enough that damages "were payable upon a failure of entire com- "pletion, and that was rendered impossible "by the defendant's acts; and her executor "cannot recover for a failure which she "made inevitable. But for that we cannot "say that there would have been any delay "beyond the contract time."

Weeks *v.* Little, 89 N. Y., 570.
Willis *v.* Webster, 1 App. Div., 301.

The conclusion, then, of the learned Referee that the defendant was not entitled to deduct the $40,000 forfeiture for non-completion by the first day of June, 1888, is fully supported by the facts found by him as to the non-performance of its obligations by the defendant and its waiver thereby of the time limit in the contract.

Second.—THE FINDINGS OF THE REFEREE FULLY SUPPORT HIS CONCLUSION THAT THE DEFENDANT WAS NOT ENTITLED TO CHARGE THE PLAINTIFF WITH THE SUM OF $9,558.63, THE AMOUNT PAID BY THE DEFENDANT FOR PATENTED NUT LOCKS WHICH WERE FURNISHED BY IT DURING THE PERFORMANCE OF THE WORK.

This amount is included in the sum of $3,626,-865.20 stated in the receipt as the amount of payment made by the defendant to the plaintiff under the following heading:

> "And whereas the said Chicago, Milwaukee and St. Paul Railway Company has paid the said Clark to apply on said contract in money, material, labor and transportation, the sum of $3,626,865.20."

See Receipt, page 114, folio 341.

The item for nut locks, although not specifically designated, is contained in that amount.

See Referee's Findings, p. 113, fol. 339.

There was no question in the case upon the following points:

1st. That the nut locks were furnished and paid for by the defendant.

2d. That they were used in the construction of the road.

The only point was as to which of the parties is properly chargeable for them.

(A). *As to the items for nut locks, the Referee found the following facts:*

9.

"That during the progress of the work the de-
" fendant purchased and furnished to the plaintiff
" and charged him for patented nut locks for which
" the defendant paid $9,558.63."

10.

"That the said nut locks so furnished by the de-
" fendant were used by the plaintiff in the construc-
" tion of the road."

11.

"That there are no provisions in the contract "which require that the plaintiff, and the plaintiff "never agreed that he should use in the construc- "tion of the road under said contract any patented "nut locks.

"That the plaintiff was ordered by the defend- "ant to put such nut locks on the road at the be- "ginning of the work. That he protested against "their use, and finally yielded and used them in "track laying upon the promise that the matter of "the charge for said nut locks should be adjusted "after the completion of the contract."

See Referee's Finding, pages 112, 113.

UPON THE FACTS SO FOUND, the REFEREE FOUND AS CONCLUSIONS OF LAW:

3.

"That the plaintiff is not liable to the defendant "for the sum of $9,558.63, the cost of patented "nut locks furnished by the plaintiff to the defend- "ant and used by him in the performance of the "said contract."

4.

"That there was no obligation imposed by the "contract upon the plaintiff to furnish and pay for "patented nut locks to be used in the construction "of said road."

5.

"That the plaintiff is not legally indebted to the "defendant in any sum whatever for patented nut- "locks furnished by the defendant, and used in the "construction of the railroad under said contract."

See Conclusion of Law, page 118.

(B). *The conclusions of the learned Referee are fully supported by the facts found by him, as there was no obligation upon the plaintiff to furnish patented nut-locks, and they were furnished by the defendant without the request of the plaintiff, and used by him in the construction of the road solely upon its request so to do.*

1st. IF IT IS CLAIMED THAT THEY WERE REQUIRED TO BE FURNISHED UNDER THE CLAUSE OF THE CONTRACT REQUIRING THE WORK TO BE DONE IN A WORKMANLIKE MANNER, THEY CANNOT BE SO CHARGED.

The workmanlike manner under which this contract was to be performed, was that particularly specified and designated in the contract and specifications themselves.

Nut-locks were not mentioned in the specifications and contract. They are a patented and expensive article.

If it had been intended to obligate the plaintiff to furnish nut-locks, they should have been specified.

The explicit mention of all the other items of track material, forbids the including of nut-locks.

This makes applicable the legal maxim, "*Mentio unius exclusio alterius.*"

2d. IF THEY ARE INCLUDED IN THE CONTRACT, THEY MUST BE INCLUDED UNDER THE HEADING OR NOMENCLATURE OF SPLICES AND BOLTS OF THE J. T. CLARK PATTERN OR SPIKES AND TIES, STEEL RAILS, ANGLE-BARS AND BOLTS, TRACK BOLTS AND TRACK SPIKES, AND AS SUCH, MUST BE CHARGED FOR BY WEIGHT UNDER THE CONTRACT.

Those are the only track materials specified in the contract.

See Article 6, Section 1, p. 159.
" " 14, " 1, p. 172.
" " 16, " 6, p. 177.

Those were the only kind of track material specified in the contract, which could in any way cover the nut locks.

They were the only classes of track materials which the defendant was at liberty to purchase and charge to the plaintiff.

The defendant's witnesses, Delano, Moore and Moll, say that nut locks are part of the track bolt.

It will be observed that in each of the three articles of the contract above referred to, track bolts are specified.

Upon either of these theories, the defendant would only have the right to charge the plaintiff at the rates specified in the contract and not at the exorbitant rate sought to be charged.

The contract fixes the sums to be paid as follows:

> Angle bars, 1.65/100 cents per pound.
> Track bolts, 2.60/100 cents per pound.
>
> See Contract, Article 6, Section 1, p. 160, fol. 478.

In other words, the contractor was to be charged by weight for those articles instead of by price paid.

A correct calculation of all the nut locks used upon the main line of this railroad shows the following facts:

352 joints were used for each mile of road; there were six nut locks on each joint or 2,112 nut locks to a mile. The entire number of nut locks for 202.8 would be 428,313 nut locks.

From actual weight of locks used, 15½ to 16 nut locks made a pound.

If the defendant's contention as to the interpretation of the contract is correct as to the weight of the nut locks, the plaintiff could be charged only

for them by weight and as angle bars or splices at the following rates:

As a part of the angle bars and at angle bar price, 27,108 pounds of nut locks at .0165 per pound, $441.11.

Or as part of track bolts at track bolt price, 27,108 at .026, $704.80.

Testimony of Hegeman, pp. 407-408.

The plaintiff claims that the patent nut locks could not be required in any case under the terms of the contract, but that if they could be required, the defendant could only charge for them under the two theories above mentioned the sum of $447.28 or $704.80, instead of the sum of $9,558.63.

Third.—THE RECOVERY BY THE PLAINTIFF OF THE SUM OF $2,425, THE VALUE OF TIMBER BELONGING TO HIM CONVERTED BY THE DEFENDANT IS ALSO FULLY SUPPORTED BY THE FACTS FOUND BY THE REFEREE.

(A). *The facts found by the Referee are as follows:*

19.

"That in or about the months of March and "April, 1888, the plaintiff was the owner of 97,000 "feet B. M. bridge timber then in the yard of "the defendant at Chillicothe and on the line of "the railroad."

20.

"That the said lumber did not conform to the "standard of the defendant and was not purchased "by the defendant from the plaintiff or allowed in "the final certificate of the chief engineer under "the contract in this action to the plaintiff."

21.

"That in and about the month of June, 1888, "the defendant took possession of the said lumber "and converted the same to their own use without "assent or knowledge of the plaintiff."

22.

"That the value of the said lumber at the time "of the taking in June, 1888, was $2,425."

See Referee's Findings, page 117.

Upon the facts so found, the Referee held as a conclusion of law.

6.

"That the plaintiff is entitled to recover from "the defendant the sum of $2,425, with interest "from June 1st, 1888, for the conversion by the "defendant of lumber belonging to the plaintiff."

See Referee's Findings, page 118, folio 354.

(B). *There is no merit in the technical defenses set up by the defendant to the recovery of that item.*

1st. It was not covered in the engineer's final estimate, for the reason that the estimate antedated the conversion of the material.

2d. It was not at all affected by the provisions of the contract in regard to the final estimate, for the reason that it is a claim entirely outside of the contract and not arising under it.

3d. No question as to joinder of actions of tort and contract can be raised.

As it appears upon the face of the complaint, it must be raised by demurrer and is waived because not so raised.

See N. Y. Code, Sec. 499.

The questions above considered, it is submitted, are the only ones which are open, in any event, for review by this Court, and as to those questions, it is also submitted, there is no error of law in the judgment upon the facts found by the Referee.

Point IV.

The receipt offered in evidence by the plaintiff in error is not a bar to the recovery by the defendant in error for the two items allowed by the Referee under the first cause of action.

First.—THE FACTS FOUND BY THE REFEREE IN RELATION TO THE RECEIPT, ARE AS FOLLOWS:

13.

"That upon the 9th day of March, 1888, the "plaintiff signed and caused to be delivered to a "representative of the defendant a paper writing "or receipt presented to him by the defendant "for signature, of which the following is a copy; "and upon the signature thereof by said Clark, "and its delivery by him to the defendant, the "plaintiff was paid by the said defendant, the said "sum named therein of $232,532.40, less the sum "of $40,000 claimed in said paper to be retained "for forfeiture in not completing performance of

" his work under said contract on or prior to June " 1st, 1887, and the sum of $3,626,865.30 included " therein, embraces said sum of $9,558.63 claimed " by defendant to be due for nut locks. Said " $40,000 so deducted and the actual amounts so " paid, was $173,532.49."

(Here follows a copy of the receipt):

14.

" That said receipt and paper contained an ac- " curate, truthful and *undisputed* account of all " dealings between said parties, *except in the mat- " ter of the $40,000 deducted for time forfeiture. The " $9,558,63 for nut locks embraced in the $3,626,865.- " 30 and the lumber hereinafter referred to and " herein valued at $2,425.* Besides the above, the " defendant has paid the $40,000 reserved as in- " demnity or security for the payment of claims " against Clark and in addition thereto upon like " accounts, the sum of $521.75."

15

" That at the time of the signing and delivery of " said last mentioned paper, the final certificate or " estimate of the chief engineer under the contract, " had not been delivered to the plaintiff or any of " his agents by the defendant or the said engineer " and the contents thereof were not known to the " plaintiff other than by reference thereto contained " in said receipt of March 9th, 1888."

16

" That no other final settlement of the accounts " under said contract had been had between the " plaintiff and the defendant at the time that the " said last-mentioned paper was signed and de- " livered."

17

"That at the time of the signing and delivery of "said last-mentioned paper the question of the "liability of the plaintiff for nut locks which had "been left by the parties to this action open for "settlement and adjustment until after the comple- "tion of the work under said contract and had been "referred by the defendant to the chief engineer "under said contract, had not been passed upon by "him; that the said chief engineer had referred the "question for opinion to the defendant's counsel, "but had not at said time given his opinion in re- "lation thereto."

18

"That no account was ever otherwise than by "said paper and a receipt of said money, stated of "the transactions under and connected with said "contract between the plaintiff and the defendant."

See Findings, pages 116–117.

UPON THE FACTS SO FOUND, THE LEARNED REFEREE FOUND AS CONCLUSIONS OF LAW.

7

"That the signing and delivery by the plaintiff "of the receipt on or about the 9th day of March, "1888, and the acceptance of the check of $173,- "532.49 under the facts and circumstances proved "in this case were as to the two sums of $9,558.63 "charged for nut locks and $40,000 charged by "way of forfeiture for non-performance in time "wholly without consideration and in violation of "the contract between the parties and do not con- "stitute any bar to the recovery of the plaintiff for "the sums of $9,558.63 and $40,000 otherwise as "due under the contract."

8.

"That the signing and delivery of said receipt, "and the acceptance of the check thereunder, do not "constitute a legal payment or accord and satisfac- "tion of the said sums of $9,558.63 and $40,000 or "either of them or any part or either of them."

9.

"That no account of the transactions under this "contract and of the claims sued on in this action "was ever had or stated between the parties to this "action otherwise than by said receipt or paper of "March 9th, 1888."

See Conclusions, pages 118–119.

By this receipt, the defendant sought to establish

1st. Payment.

2d. Accord and satisfaction.

3d. An account stated.

As to payment, the answer alleges:

"And the defendant alleges that it has "paid to or for the plaintiff, or on his ac- "count, under the said contract, in money, "material, labor and transportation, as au- "thorized and provided for in and by the "said contract, a sum in excess of any and "all amounts which became due or were "earned by the plaintiff under said contract, "or which had been certified to or allowed "by the Chief Engineer of the defendant "Railway Company, including all extra "work performed or material furnished by "the plaintiff under said contract, or in addi- "tion thereto."

See Amended Answer, page 24, fol. 71.

As to the account stated, the answer alleges:

After stating the making of the supplemental contract and of the final estimate and certificate of the engineer, it alleges:

> "And thereupon and on or about the 9th
> "day of March, 1888, an account was stated
> "and agreed to by and between the plaintiff
> "and the defendant Railway Company,
> "whereby the amount of the compensation
> "due to the said plaintiff Clark for all the
> "work done and material furnished by him
> "under the said contract of March 6th, 1886,
> "for the construction of the railroad of the
> "defendant from Ottumwa, Iowa, to the
> "Missouri River, including all extra work
> "performed and material furnished of every
> "kind and description, less deduction made
> "for work not done and work assumed by
> "the defendant Company, was agreed upon
> "and fixed and adjusted at the sum of
> "$3,895,798.79. * * * And that the
> "amount then due to said Clark on said con-
> "tract was the sum of $213,532.49."

See Amended Answer, 4th defense, pages 27-28, fols. 81-82.

As to accord and satisfaction, the answer alleges:

> "That thereupon, and on the said 9th day
> "of March, 1888, the said defendant Railway
> "Company duly paid to the said Heman
> "Clark the said sum of $173,532.49, and the
> "said plaintiff Clark thereupon acknowl-
> "edged in writing that he had received from
> "the said defendant Railway Company the
> "said sum of $173,532.49, in full satisfaction
> "of the amount due to him on said esti-
> "mates of said Chief Engineer of the defend-
> "ant Railway Company, and in full satis-

" faction of all claims and demands of every
" kind, name and nature arising from, or
" growing out of, said contract of March 6th,
" 1886, and of the construction of said rail-
" road, excepting the obligation of the said
" Railway Company to account for such sum
" of $40,000, as provided in and by the said
" receipt and acknowledgment of the said
" plaintiff Clark."

See Amended Answer, page 29, fol. 87.

This receipt, it will be noticed, has upon it no seal and cannot, therefore, be treated as a sealed instrument.

Upon it the defendant rested practically its entire defense.

When asked whether it was just and right that the plaintiff should be mulcted in the sum of $40,000 for not completing the road in time when the conceded testimony shows, and the Referee found, that the fault was that of the defendant, its only reply is the plaintiff has lost his right to payment by reason of the receipt.

When asked whether it was just and reasonable and whether there is any provision of the contract warranting it in taking from the plaintiff $9,558.23 for nut locks, its only answer is the receipt prevents the payment.

It was read, reread and read again at every stage of the trial, and it was claimed constantly by the defendant that no matter how just were the claims of the plaintiff, the receipt was a bar to them all.

It is claimed that the receipt stands as payment though no payment has been made ; that it stands for an account stated though no account has been rendered and no statement made ; that it stands for an accord and satisfaction without the slightest

proof of the accord. The defense is not a just one, and, it is submitted, is also not a legal one.

The receipt will now be considered in the three aspects relied upon by the defendant:

1st. ITS LEGAL EFFECT AS EVIDENCE OF PAYMENT.

2d. ITS LEGAL EFFECT AS AN ACCORD AND SATISFACTION.

3d. ITS LEGAL EFFECT AS AN ACCOUNT STATED.

Second.—**The legal effect of the receipt as payment.**

(A). *It is well settled that a receipt is simply prima facie evidence of payment.*

"Receipts form a well-established exception to "the rule that a written instrument cannot be "varied or contradicted by parol evidence. *One "may thus contradict his own receipt.* The ac- "knowledgment of mere payment in a receipt is "*prima facie* evidence only and may be rebutted "by parol evidence showing that the consideration "is different in kind or amount from that named, "or that notes or checks were taken in payment; "that it was paid only in part or not at all, or that "the consideration which did pass was illegal. In "most of the States this may be shown, though "the receipt may be in full of all demands or em- "bodied in the consideration clause of an instru- "ment under seal."

Am. Enc. of Law, Vol. 19, page 115.

There are some States in which it is held that where the receipt contains a seal, that it is not open to oral explanation.

In the present case there is no seal upon the receipt, and there is no claim that any seal was ever placed upon it.

The decisions of all the States agree that in such cases receipts are open to oral explanation.

It will be sufficient, in addition to this general statement of the rule, to cite cases showing that the same rule prevails in the Federal courts and in the courts of the State of New York.

Fire Ins. Co. *v.* Wickham, 141 U. S., 564.

Harris *v.* Davis, 44 Fed. Rep., 172.

Judge EARL, of the Court of Appeals, thus very clearly lays down the rule:

"The only question then for us to consider is whether the various receipts in full "were so far conclusive upon the plaintiff "that he could not show by parol that the "items for extra bonus paid by him to the "butchers were nevertheless his due.

"*It has long been settled in this State, that "a receipt furnishes mere prima facie evi- "dence of the facts stated therein, and that "it may be controverted or explained by "parol evidence. This grows out of the fact "that a receipt is not a contract. It is a "mere declaration or admission in writing.*

"* * *

"It has never been intimated, in any case "in this State, that it made any difference "whether the receipt was for a specified sum "of money, or in full. The same rule ap- "applies, and no reason is apparent why it "should not. A receipt for a specified sum "of money contains a declaration that so "much has been paid upon account, or for a

" particular purpose. A receipt in full con-
" tains a declaration that a certain sum has
" been paid in full of all claims of a certain
" kind, or of all demands. Neither kind of
" receipt embodies any contract. Both fur-
" nish only *prima facie* evidence, and are
" valuable only as such. Both are equally
" open to explanation or contradiction."

Ryan *v.* Ward, 48 N. Y., 207.
Miller *v.* Coates, 66 N. Y., 609.

(B). *The transactions culminating in the receipt show that the defendant has never actually paid the amount claimed by the plaintiff.*

It was conceded by both parties, and stated in the engineer's certificate, and in the receipt itself, that there had been earned by the plaintiff under the contract the sum of $3,895,798.79.

It was also not disputed, and likewise stated in the receipt, that the plaintiff should be credited for materials sold, and for rebates and other matters of that description the sum of $34,598.90, making a total of $3,930,397.69.

As to that amount being due, there was no dispute whatsoever.

We start then with the amount concededly due to the plaintiff.....		$3,930,397 69
The receipt states that there had been paid to the plaintiff to apply on the contract in money, material, labor and transportation, the sum of.....	$3,626,865 20	
In this amount the Referee found that		

the plaintiff's claim for nutlocks was included. (See Findings, page 166, folio 346.)		
There had then been paid in money, material, etc., less the claim for nutlocks, the sum of.....	3,617,306 57	
Claim for nutlocks.	9,558 63	$3,626,865 20
Leaving a balance of.....		$303,532 49
Out of this balance the defendant sought to offset two items, which were undisputed as to amount.		
The items are the amount charged for transportation.....	$50,000	
Amount deducted by way of forfeiture for non-completion..	40,000	90,000 00
Leaving a balance of.....		$213,532 49
As against this balance the defendant retained under the contract, and it was not disputed that it had the right so to do, as security for liens and claims.....		40,000 00
Leaving a balance of.....		$173,532 49

It was this balance that was paid by the check and for which the receipt was given.

The following statement will show more clearly the transactions as shown in the receipt:

SUMMARY.

Earned under contract fixed by engineer		$3,895,798 79
Amount fixed for materials, rebates and other matters of that description		34,598 90
Total		$3.930,397 69

PAYMENTS AND CREDITS.

Transportation fixed by contract.	$ 50,000	
Amount retained as security for liens, etc	40,000	
Payments in money, etc	3,617,306 57	3,707,306 57
Balance		$223,091 12
Deducted for nutlocks	$9,558 63	
Deducted for overtime penalty	40,000 00	49,558 63
Balance		$173,532 49

At the time of the receipt by the plaintiff of the $173,532.49 there was no dispute, and could be none, between the parties but that at least that sum was due, as it was the difference between the amount due the plaintiff, after deducting all offsets claimed by the defendant *in accordance with its contention.*

IN OTHER WORDS, BY THAT PAYMENT THE PLAINTIFF GOT SIMPLY THE AMOUNT WHICH, IN ANY EVENT, HE WAS LEGALLY ENTITLED TO AND AS TO WHICH AMOUNT THE DEFENDANT HAD NO DEFENSE TO ITS PAYMENT.

Unless, then, the defendant can show that the difference between the amount due to the plaintiff, to wit, $3,930.397.69, and the amount of the payment for which the receipt was given, $173,532.49, has been paid or released, the acceptance by the plaintiff of the sum of $173,532.49 in full payment would be no bar to his recovery for the difference, under the rule that payment by a debtor of a part of his debt is not a satisfaction of the whole.

United States *v.* Bostwick, 94 U. S., 53.
Fire Ins. Co. *v.* Wickham, 141 U. S., 564.
Ryan *v.* Ward, 48 N. Y., 204.
Gray *v.* Barton, 55 N. Y., 68.
Perkins *v.* Lockwood, 100 Mass., 249.
Curran *v.* Rummell, 118 Mass., 483.
McKay *v.* Myers, 168 Mass., 312.
Hodges *v.* Truax (Ind.), 49 N. E. Rep., 1079.
Myers *v.* Green (Ind.), 51 N. E. Rep., 942.
Fletcher *v.* Wurgler, 97 Ind., 223.
Marion *v.* Heimbach (Minn.), 64 N. W. Rep., 386.
McIntosh *v.* Johnson (Neb.), 70 N. W. Rep., 522.
Cincinnati *v.* Cincinnati Railroad Co., 6 Ohio N. P., 140.
See also Fitch *v.* Sutton, 5 East's Rep., 230.

That the receipt in full of itself would in no way bar recovery by the plaintiff if its effect was to discharge an amount concededly due by the payment of a part, was expressly decided by this Court in FIRE INS. ASSN. *v.* WICKHAM (*supra*).

In that case, speaking of the effect of a receipt in full, Mr. Justice Brown said:

"It was not seriously contended in this "case that the defendant was not legally "liable upon its policies for the expenses "clearly incidental to the fire, of raising and "saving the vessel as well as for the direct "injury to the vessel in consequence of the "fire, and if the plaintiffs were induced to "settle their claims for one-half the amount "that was due them, and there was no con- "sideration for the relinquishment of the "other half, this suit will lie for the recovery "of the amount. The rule is well established, "that where the facts show clearly a certain "sum to be due from one person to another, "a release of the entire sum upon payment "of a part is without consideration, and the "creditor may still sue and recover the "residue.

"If there be a *bona fide* dispute as to the "amount due, such dispute may be the sub- "ject of a compromise and payment of a "certain sum as a satisfaction of the entire "claim, but where the larger sum is ad- "mitted to be due, or the circumstances of the "case show that there was no good reason to "doubt that it was due, the release of the "whole upon payment of part will not be "considered as a compromise, but will be "treated as without consideration and void."

Fire Ins. Assn. *v.* Wickham, 141 U. S., 564.

Unless, then, there was a release by the plaintiff of the balance of his claim upon some new consideration, the receipt in full is no bar to his recovery.

Third.—**The legal effect of the receipt as an accord and satisfaction.**

To make the rule that payment of a part of a debt concededly due is no bar to the recovery of the balance inapplicable to this case, either one of two things must appear.

(*a*). *That the amount due the plaintiff was an unliquidated demand, or*

(*b*). *That there was a bona fide dispute between the parties as to the amount due, which was settled upon a sufficient consideration.*

Neither one of these two conditions exists in the case at bar.

1st. THE AMOUNT DUE THE PLAINTIFF WAS A WHOLLY LIQUIDATED DEMAND.

(*a*). The contract, Article 15, Sec. 1, provides as follows:

> "The party of the first part further agrees "to pay to the said second party, in the man- "ner and at the time and times hereinafter "set forth, the sum of $3,954,600; which "said sum shall be in full settlement, pay- "ment and satisfaction, of all and every "claim and demand of said second "party upon or against the said first party "for building, constructing and fully com- "pleting, in strict conformity to the stipula- "tions, specifications and requirements, "hereinabove mentioned and referred to, the "said railroad, in this agreement proposed "and agreed to be built, and the said pay- "ment and payments shall be made as fol- "lows, to wit:

By Article 15, Section 2, it is provided:

> "The party of the first part further agrees "that *whenever* the said *Chief Engineer shall*

"*furnish to* it, the said first party, *his certif-*
"*icate* that all the stipulations and coven-
"ants in this agreement contained, to be by the
"said second party kept and performed, have
"been by said party well and truly observed
"and carried out, and that the said first par-
"ty's railroad herein proposed and agreed to
"be built, has been by said second party con-
"structed, built, completed and finished in
"all respects, in full conformity with the
"covenants and agreements hereinabove in
"that behalf made by said second party, and
"shall with said certificate also present his,
"the said Chief Engineer's , estimate of the
"amount and value of the various kinds of
"work done by said second party under the
"terms of this agreement, *which said esti-*
"*mate shall be final and conclusive between*
"*the parties hereto*, then the said first party
"shall and will pay to the said second party
"the sum or sums, if any, shown by said
"final estimate to be due to said second
"party under the terms of this agreement,
"and will also pay so much of the said sum
"of five hundred thousand dollars thereto-
"fore retained by said first party as has not
"been previously paid to said second party.
"*Provided that the entire amount of com-*
"*pensation so to be paid to said second*
"*party, as in this article provided, shall*
"*not exceed the said sum of $3,954,600.*"

By Art. 16. Sec 3:

"It is further mutually understood and
"agreed, by and between the said parties,
"that, in case the said second party shall be
"by said Chief Engineer required, in writing,
"to furnish any material, or to do any
"work not hereinabove required of and

"agreed to be furnished or performed by "said second party; or in case the said sec- "ond party shall in like manner be required "by the said Chief Engineer to furnish and "erect any structure of a more expensive "design or plan than that called for by the "standard plans of said first party, and herein- "above by said second party agreed to be fur- "nished and erected, then and in every such "case the said second party shall furnish such "material or do such work, or shall furnish "and erect such more expensive structure "as aforesaid, as the case may be, and shall "receive from said first party such just and "reasonable compensation for such material "or work, or for such more expensive struc- "ture so as aforesaid required of him, as the "said Chief Engineer shall fix and deter- "mine."

Under all these provisions, no matter which is allowed to control, the contract price is a liquidated demand.

1st. Under Article 15, Section 1, it is absolutely liquidated in words and terms in the contract.

2d. Under Article 15, Section 2, it is liquidated by the provision which makes the estimate of the Chief Engineer final and conclusive between the parties hereto.

If there was any extra work ordered in writing, or any additional structure or more expensive plan, as provided under Article 16, Section 3, the compensation was also to be fixed and determined by the Chief Engineer.

THE AUTHORITIES ARE UNIFORM TO THE EFFECT THAT THE FINAL CERTIFICATE, IN THE ABSENCE OF

FRAUD OR MISTAKE, IS AN ABSOLUTE BAR, AND BINDING UPON BOTH PARTIES.

Kihlberg *v.* U. S. 97 U. S., 398.
Sweeney *v.* U. S., 109 U. S., 618.
Mundy *v.* Louisville & N. R. R., 67 Fed. Rep., 633.
Brayman *v.* Ann Arbor R. Co., 85 Fed. Rep., 579.
Sweet *v.* Morrison, 116 N. Y., 19.
Smith *v.* the Mayor, 12 App. Div., 391.

As to the sum of $3,895,798.79, certified by the Engineer, there can then be no question but that it was a liquidated amount in the strictest sense.

(*b*). Nor was the sum of $34,598.90 credited by the defendant to the plaintiff in the receipt for materials sold and for rebates and other matters of that description an unliquidated or unascertained amount.

The Referee, as to the amounts stated in the receipt, expressly finds "that said receipt and paper " contained an accurate, truthful and UNDISPUTED " account of all dealings between said parties, ex- " cept in the matter of the forfeiture of the $40,000 " deducted for time forfeiture, the $9,558.63 for nut " locks embraced in the $3,626,865.20 and the lum- " ber hereinafter referred to and herein valued at " $2,425."

See Referee's Findings, page 116, folio 347.

The construction put upon this finding by the learned judges in the court below was that the Referee used the word "undisputed" as synonymous with the word "liquidated;" that he was evidently satisfied from the testimony that the prior transactions between the parties were such that

the sum of $34,598.90 was no more open to dispute than was the sum of $3,895,798.79, to which the chief engineer had certified.

See Opinion Lacombe, J., Chicago, Milwaukee & St. Paul R. R. Co. *v.* Clark, 92 Fed. Rep., 968, at page 982.

That the learned Judge correctly interpreted the finding clearly appears from a reference to the opinion written by the Referee, wherein he says:

> " The claim of Clark against the company
> " for the sum of $3,930,397.69 was a liquidat-
> " ed sum, liquidated by the umpirage of the
> " Chief Engineer, as proved by the final cer-
> " tificate and estimate, and by this receipt
> " prepared by the Company. * * *
>
> " Had it been an unliquidated or undis-
> " puted claim, or a claim upon a *quantum*
> " *meruit* requiring a valuation of worth or
> " material, different considerations might
> " apply, but these are properly speaking un-
> " disputed claims. They are claims which
> " the Company had no right to dispute, and
> " the written concession contained in this
> " receipt by Clark was based upon no con-
> " sideration whatever."

See Referee's Opinion, page 81, fols. 241-242.

If this Court were permitted to look into the record, it would find that the sum of $34,598,90 was, in fact, settled upon and fixed long prior to the signing of the receipt.

Mr. Hegeman, the superintendent in charge of the work under Mr. Clark, testified:

> " I stated that $3,930,397.69 was the amount
> " earned under the contract and for mate-

" rials sold to the Company. Of that amount
" I said $34,598.90 was material sold by Mr.
" Clark to the Company. Those materials
" were bridge ties, some grade ties, timber,
" various construction materials. * * *
" I arrived at those figures in this way; the
" accounts were made up by our bookkeeper
" and the accounts as to freight, charges,
" etc., our account was made out and a
" counter-account was made out by the Chi-
" cago, Milwaukee & St. Paul, and the two
" bookkeepers got together and checked their
" accounts, and that is the result of it, a
" statement of it."

See Testimony of Hegeman, page 256, fols. 765-766.

Mr. Kimball, the assistant chief engineer for the plaintiff in error, also testified:

" The aggregate amount of the monthly
" estimates with which Mr. Clark was cred-
" ited is $3,895,798.79. * * Other credits
" were made to Mr. Clark. There were a
" series of vouchers aggregating in the whole
" $34,598.90. * * (Paper handed witness.)
" This is the voucher for that sum; that is
" the voucher that includes the credit for
" lumber taken off of Mr. Clark's hands at
" the time of the completion of the con-
" tract."

See testimony of Kimball, page 322, fol. 964.

Aside from the findings of the Referee and the construction put upon them by Judge Lacombe, it is clear that the statement of that amount as due to the plaintiff in the receipt prepared by the defendant is an admission binding upon it which pre-

cludes the contention that the same was not a fixed and undisputed amount, and hence a liquidated claim as between the parties. This was the view taken by Judge Wallace.

In his opinion the learned Judge said:

> " It is conceded that as to the part of the " plaintiff's demand established by the certifi- " cate of the engineer, it was a liquidated " and undisputed demand against the de- " fendant in the sense in which these terms " are used in considering the validity of a " promise to accept a part payment in satis- " faction of the whole demand. The other " part of the plaintiff's demand that for the " materials, etc., purchased of plaintiff by " defendant was, according to the Referee's " finding, undisputed in fact between the " parties; and this being so, it is quite un- " necessary to inquire whether it was origin- " ally one in respect to which there might " have been a fair difference of opinion be- " tween the parties as to the amount due. " The statement of account rendered by the " defendant is evidence as against the de- " fendant, not only that it was an undisputed " demand, but one the amount of which had " been ascertained by the parties. If the " amount had been ascertained, it was a " liquidated demand. As no facts appear in " the findings of the Referee to the contrary, " it is to be concluded that this part of the " plaintiff's demand was also liquidated as " well as undisputed by the defendant."
>
> Chicago, Milwaukee and St. Paul R. R. Co. *v.* Clark, 92 Fed. Rep., 968, at page 985.

In every view of the case, therefore, the amount

due to the plaintiff, $3,930,397.69, was a wholly liquidated demand.

2d. *Not only was the amount due to the plaintiff a fixed and liquidated sum, but the amount of every payment and offset deducted by the defendant was likewise a fixed and liquidated amount.*

The payments and offsets conceded by both parties to have been properly made and deducted are the following items:

(A). Amount paid in money, material, labor, and transportation,	$3,626,865.20	
Less payment for nut-locks	9,558.63	$3,617,306.57
(B). Additional amount deducted for transportation,		50,000
(C). Amount retained as security for liens, etc.		40,000
		$3,707,306.57
As already shown under this Point there was no dispute between the parties as to the amount earned,		$3,930,397.69
Nor was there any dispute as to the defendant being entitled to the above credits for.		3,707,306.57
Leaving a balance of		$223,091.12

This balance; it is submitted, is a wholly liquidated demand because it is simply the difference between amounts concededly due and not arrived at by the settlement of any dispute whatsoever.

It is just as much a liquidated claim as if the plaintiff had a claim against the defendant on a promissory note for $3,930,397.69 and the defendant

had a claim against the plaintiff on a note for $3,707,306.57.

Of course it could not be said that the difference between the amounts of the notes, $223,091.12, was unliquidated in any sense.

IN OTHER WORDS, A DEMAND CANNOT BE SAID TO BE UNLIQUIDATED IF IT CAN BE ASCERTAINED BY THE SIMPLE PROCESS OF CALCULATION.

And so here the difference between the amounts concededly earned and the amount concededly paid is a wholly liquidated demand.

2d. WE ARE THUS BROUGHT TO THE CONSIDERATION OF THE OTHER PROPOSITION: WAS THERE A BONA FIDE DISPUTE BETWEEN THE PARTIES WHICH WAS SETTLED UPON A SUFFICIENT CONSIDERATION, WHICH PRECLUDES THE RECOVERY BY THE PLAINTIFF OF THE DIFFERENCE BETWEEN THE LIQUIDATED DEMAND OF $223,091.12 AND THE AMOUNT PAID THEREON, $173,532.49, VIZ.: $49,558.63.

In considering this question it must be remembered that it is not claimed that there had ever been a settlement between the parties prior to the giving of the receipt.

There had been no going over the accounts *pro* and *con* and the receipt given as a release of the mutual settlement of their differences.

The Referee expressly found "that no other final settlement of the accounts in said contract had been had between the plaintiff and the defendant at the time that the said last-mentioned paper was signed and delivered."

See Referee's Finding, page 116, folio 247.

Hence the sole question for consideration is what is the legal effect of the receipt under the facts

found by the Referee as a release and discharge of an indebtedness legally due?

As to none of the items mentioned in the receipt was there any dispute as to their *amount*, and with the exception of the two above mentioned there was no dispute whatsoever between the parties as to the *right* to deduct them. In the payment of the balance of $173,532.49 stated in the receipt, the defendant did not pay one penny more than it was legally bound to pay, and which amount it was conceded was due to the plaintiff in any event.

In the language of Judge Wallace:

> "The case is not precisely one where the "debtor refuses to pay the whole of an un- "disputed and liquidated demand and exacts "a promise from his creditor to receive part "in satisfaction of the whole; strictly it is "one where the creditor having two undis- "puted and liquidated demands against a "debtor and the debtor claiming to have "cross demands and counter-demands against "the creditor refuses to pay the creditor's "demands unless the validity of the cross- "demands is acknowledged and their amount "allowed to him by the creditor.
>
> "By the statement of account and the re- "ceipt annexed to it, the defendant in fact "took this position and notified the plaintiff "that as a condition to paying the demands "which it conceded to be due the plaintiff, "the latter must allow and deduct the deb- "ited items for the nut locks and the forfeit- "ure. Upon this state of facts, a promise to "allow the whole amount of the cross-de- "mands has no consideration to sustain it, "because in contemplation of the law no "benefit could accrue to the promisor and "no injury to the promisee. The promisor "derives no benefit, because he allows the

" whole. The promisee is not injured because " he relinquishes nothing."

Opinion Wallace, J., Chicago, Milwaukee and St. Paul R. R. Co. *v.* Clark (*supra*).

In other words, where there are disputed claims and conceded claims, the disputed claims cannot be discharged or released by payment simply of the conceded claims.

There must be a new consideration of some kind to settle and discharge the disputed claims.

If the defendant had said we owe you $173,532.49 in any event and there is a dispute between us as to whether or not we owe you $49,558.63. If you will relinquish your claim to the disputed items, we will pay you $180,000 in full payment and satisfaction, then, of course, the receipt of the sum of $180,000 in full payment and satisfaction would be a bar to any recovery by the plaintiff on the disputed items. *There would then have been a new consideration.* But, in this case, there was not one dollar paid by the defendant in consideration of the release by the plaintiff of the disputed claims.

There was no mutual concession in this case to support a settlement, because the defendant has not paid one penny more than was concededly due by it under the contract, giving to it full credit for the disputed items. A release by the plaintiff of his rights would under such circumstances be a gift pure and simple to the defendant of $49,558.63 for which he received no consideration whatsoever.

His agreement, to release, no matter how binding it might be in its language, would be a *nudum pactum* and hence unenforcible.

3d. THAT AN ACCORD TO BE BINDING MUST BE BASED UPON A SUFFICIENT CONSIDERATION IS THOROUGHLY WELL SETTLED BY ALL THE AUTHORITIES.

We cannot do better than quote from the opinion of Judge Lacombe in the Court below, declaring what is known to the law as "accord and satisfaction."

The learned Judge said:

> "The agreement between parties which is "known to the law as 'accord and satis-"faction' is a contract, and like all other "contracts it needs a consideration to make "it valid. Without consideration it is *nudum* "*pactum*.
>
> "The consideration may present itself in "many different shapes, It may be found "in premature payment; in payment in some "manner different from that bargained for "in the original contract; in the giving of "some desired article in place of money; in "the giving of further security or of differ-"ent security for the reduced amount; in "mutuality of concession; in abandonment "of a right to litigate or to appeal. But in "some form or other a consideration must "be found. There must be some advantage "or presumed or assumed advantage accru-"ing to the party who yields his claim." * *
>
> "The rule of law as to accord and sat-"isfaction is usually stated thus:
>
> "Payment by a debtor of a part of his liqui-"dated debt is not a satisfaction of the whole "unless made and accepted upon some new "consideration, but where the debt is un-"liquidated, the rule does not apply." When, "however, a creditor's claim is made up in "part of an amount so adjusted by agree-

" ment of the parties that the debtor cannot
" in good faith contest it, and in part of an
" amount not thus adjusted, and the debtor
" pays only the adjusted portion of the claim
" and insists on the release of the entire or
" unadjusted portion, without any new con-
" sideration moving to the creditor, reason
" and principle would require a decision that
" there had been no accord and satisfaction;
" and except for the few cases referred to
" above where the point was not discussed
" the authorities are in harmony with such
" a decision.

" The rule might be more accurately
" stated: " Payment by a debtor of a liqui-
" dated amount, presently due, and to which
" he has no defense that can be urged in
" good faith or with color of right, is not by
" itself a sufficient consideration to sustain a
" release by the creditor of other unliquidated
" claims against the debtor."

Opinion Lacombe, J., Chicago, Milwaukee & St. Paul R. R. Co. *v.* Clark, 92 Fed. Rep., 968, at page 976.

The conclusions of the learned Judge, it is submitted, are fully borne out by the authorities.

Fire Ins. Assn. *v.* Wickham, 141 U. S., 564.
U. S. *v.* Bostwick, 94 U. S., 53.
McKay *v.* Myers, 168 Mass., 312.
Currran *v.* Rummell, 118 Mass., 483.
Perkins *v.* Lockwood, 100 Mass., 249.
Hodges *v.* Truax (Ind.), 49 N. W. Rep., 1079.
Myers *v.* Green (Ind.), 51 N. E. Rep., 942.

Marion *v.* Heimbach (Minn.), 64 N. W. Rep., 386.
Fletcher *v.* Wurgler, 97 Ind., 223.
McIntosh *v.* Johnson, 70 N. W. Rep., 522 Neb.

In Fire Ins. Assn. *v.* Wickham (*supra*), this Court expressly held that where a certain sum was due for loss upon an insurance policy, a release of the entire sum, upon payment of a part, was without consideration, and the insured could still sue and recover the residue.

In that case, the payment of the part of the claim was made before it actually came due, but this Court said that such pre-payment was not a good consideration for the release of the residue, because it was not offered by the one party and accepted by the other as an element of the contract, and, therefore, formed no consideration.

4th. THE AUTHORITIES RELIED UPON BY THE DEFENDANT IN NO WAY CONTROVERT THE RULES OF LAW ABOVE STATED, AND ARE CLEARLY DISTINGUISHABLE IN THEIR FACTS FROM THE CASE AT BAR.

Every one of the cases cited by the defendant was examined and distinguised by Judge Lacombe, and it would be a work of supererogation to do more than refer to the discussion of the authorities in the opinion of the learned judge.

It is, however, desired to call attention to two cases in the State of New York, particularly relied upon by the defendant, viz.:

Fuller *v.* Kemp, 138 N. Y., 231.
Nassoiy *v.* Tomlinson, 148 N. Y., 326.

In Fuller *v.* Kemp (*supra*), a physician sought to recover for professional services upon a *quantum*

meruit, no agreement having been made in advance as to the rate to be charged.

The Court said:

> " The original contract which the law im-
> " plied was an agreement on the part of the
> " defendant to pay the plaintiff what his
> " services were reasonably worth. From the
> " very nature of the case a further agree-
> " ment must be reached by the parties fixing
> " the value of the services, or else resort
> " must be had to a judicial determination
> " for that purpose." * * * * " Under
> " such circumstances the assent of the cred-
> " itor to the terms proposed by the debtor
> " will be implied, and no words of protest can
> " affect the legal quality of his act. Where
> " the demand is liquidated, and the liability
> " of the debtor is not in good faith disputed,
> " a different rule has been applied.
>
> " In such cases the acceptance of a less
> " sum than is the creditor's due, will not, of
> " itself, discharge the debt, even if a receipt
> " in full is given. The element of a consid-
> " eration is lacking and the obligation of the
> " debtor to pay the entire debt is not
> " satisfied."

In Nassoiy *v.* Tomlinson (*supra*), a real estate agent brought an action for commissions on a sale, the amount of which had not been agreed upon by the parties.

In both the Fuller and the Nassoiy cases the plaintiffs' claim was a wholly unliquidated demand, and both cases are clearly within the exception to the general rule that—

> " Payment by a debtor of a part of his
> " liquidated debt is not a satisfaction of the
> " whole, unless paid and accepted upon some

" new consideration, but where the debt is
" unliquidated, the rule does not apply."

When asked to apply the doctrine laid down in those cases to a case not strictly within the limits of the facts in those decisions, the Court of Appeals of the State of New York in a subsequent case said:

" In these cases (Fuller *v.* Kemp, *supra*,
" and Nassoiy *v.* Tomlinson, *supra*,) the doc-
" trine of accord and satisfaction was carried
" to the extreme limit and it is not our pur-
" pose to further extend the rule."

Eames Vacuum Brake Co. *v.* Prosser, 157, N. Y., 289 at page 299.

There was then no accord and satisfaction evidenced by the receipt in this case.

By the payment of the sum of $173,532.49, the plaintiff received only the amount which he was legally entitled to in any event and the rule that a debt concededly due cannot be discharged by the payment of a part is applicable.

(*a*). Because the amount due the plaintiff was a liquidated demand.

(*b*). Because there was no dispute between the parties which was settled upon a new consideration

Third.—**The legal effect of the receipt as an account stated.**

(1st). The following finding was made by the Referee:

18.

" That no account was ever otherwise than
" by said paper and the receipt of said money

"stated of the transactions under and con-
"nected with said contract between the plain-
"tiff and the defendant."

See Finding, page 117.

This finding of the Referee is simply that independent of and leaving out of consideration the receipt there was no account rendered or agreed upon between the parties.

The Referee did not find either as a matter of fact or as conclusion of law that the receipt was an account stated, or that it was an account agreed upon.

All that was intended by the finding and all that it is in effect is that there was no claim of any other account having been rendered or stated between the parties.

It is confidently claimed that all the necessary elements to make this receipt an account stated are lacking.

The receipt itself does not contain, nor does it pretend to contain, the account to be adjusted or settled. It does not contain any items of account. It is not in the form of an account. It contains a summary of recitals of items in gross, and of facts which are not proved to be true, but on the contrary, held by the Referee to be false.

The Referee found that the receipt "contained an "accurate, truthful and undisputed account of all "dealings between said parties, *except in the* "*matter of the $40,000 deducted for time for-*"*feiture, the $9.558.63 for nut locks embraced in* "*the $3,626,865.20 and the lumber hereinafter re-*"*ferred to, and herein valued at $2,425.00.*"

See Referee's Finding, p. 116, fol. 346.

No account had ever been rendered by the defendant to the plaintiff, either in detail or in gross. No

final certificate or allowance of the engineer had been ever served upon, or delivered to, the plaintiff. The account in gross was in the possession of the vice-president here in the city of New York, and yet it was not rendered, but withheld. The engineer's certificate upon the defendant's proof was in the possession of the defendant, and yet neither it nor any copy of it was shown to the plaintiff.

(2d). *As to the legal effect.*

There are at least two reasons why the receipt does not constitute an account stated.

(*a*). The minds of the parties never met. This is absolutely necessary to make the account stated. The principle is well stated in the language of Judge EARLE:

> "But what is an account stated? It takes
> "two parties to make one, the debtor and
> "creditor. There must be a mutual agree-
> "ment between them as to the allowance
> "and disallowance of the respective claims,
> "and as to the balance as it is struck upon
> "the final adjustment of the whole account
> "and demands of both sides. Their minds
> "must meet as in making other agreements,
> "and they must both assent to the accounts
> "and balance as correct."
>
> Stenton *v.* Jerome, 54 N. Y., 484.
> Champion *v.* Joslyn, 44 N. Y., 663.

It can hardly be said in the face of these decisions that a receipt or paper signed by a party having no knowledge of the facts, without possession of either accounts or final certificate in the absence of the other party or other communication from him, can constitute an account stated, in which the minds of the parties have met.

(*b*). It is not an account stated by acquiescence or acceptance.

It needs no argument to sustain this proposition. In order to create an account stated in this manner, it is necessary that some account should be presented; that the account should be presented and retained without objection; it should be an account containing some details and items which would give the party receiving it an intelligent idea of its elements.

None of these facts can be stated as existing in regard to this receipt. No account was made, delivered or left with the plaintiff.

As to the effect of the receipt as an account stated, Judge Wallace said:

> "By signing the receipt and acquiescing
> "for a considerable period in the correctness
> "of the account rendered by the defendant,
> "the plaintiff was not precluded from recov-
> "ery. An account stated is an admission
> "that the account is correct, and if the party
> "to whom it is rendered omits to communi-
> "cate objections to the other party within a
> "reasonable time, an inference may be drawn
> "that he was satisfied with it. But there
> "is no arbitrary rule of law which renders
> "the omission to object in a given time
> "equivalent to an actual agreement or a
> "consent of the correctness of the account.
> "An account settled is stronger evidence
> "and requires more proof to overcome it
> "than a mere account stated. But the
> "parties are never concluded except by the
> "statutes of limitation from proving the in-
> "correctness of the account unless the case
> "is brought within the principles of an estop-
> "pal *in pais* or of an obligatory agreement

" between them (Lockwood *v.* Thorne, 18 N.
" Y., 285; Perkins *v.* Hart, 11 Wheat., 237)."

Chicago, Milwaukee and St. Paul R. R. Co. *v.* Clark, 92 Fed. Rep., 968, at bottom of page 986.

It is, therefore, respectfully submitted that the receipt, in no aspect whatsoever, is a defense or bar to the recovery of the plaintiff in this action.

Point V.

The receipt could not, in any event, be a bar to the plaintiff's recovery or of itself even be prima facie evidence of payment, because the Referee expressly found that it contained an untruthful and false statement.

As has been stated, the sole defense to the payment of the plaintiff's claim was this receipt. But the Referee has found that as to the only two items of plaintiff's claim for which recovery has been allowed that the receipt was inaccurate and untruthful.

First.—In the statement that there had been paid to the plaintiff in money, materials and transportation the sum of $626,865.20.

Second.—In that the $40,000 penalty for overtime had been incurred by the plaintiff.

(A). As a matter of fact, the sum of $3,626,865.20 had not been paid because the defendant had

included in that amount the sum of $9,558.63, the undisputed cost of the nut-locks. This sum it had no right to deduct, for the question of liability for this sum had been left open for the decision of the chief engineer of the defendant, who, in turn, had referred it to the counsel of the defendant. At the time of the signing of the receipt no opinion in regard to the liability of the plaintiff for that amount had been given.

(B). The plaintiff had not become liable for the $40,000 penalty for overtime, because the failure of the defendant to provide rights of way excused the delay.

That the receipt was false and untrue in respect to these two items of $40,000 and $9,558.63, which latter sum did not appear specifically as deducted in the receipt itself, but was hidden and included in the aggregate sum of the amounts alleged to have been paid, was expressly found by the Referee.

"That said receipt and paper contained an accurate, truthful and undisputed account of all dealings between said parties, EXCEPT IN THE MATTER OF THE $40,000 DEDUCTED FOR TIME FORFEITURE, THE $9,558.63, EMBRACED IN THE $3,626,865.20 AND THE LUMBER HEREINAFTER REFERRED TO AND HEREIN VALUED AT $2,425."

See Referee's Findings, page 116, folio 346.

Irrespective of the other questions raised, it is respectfully submitted that a defense founded solely on a false paper made up by the defendant itself, containing an untrue statement, and so found by the Referee, cannot be sustained.

Point VI.

If this Court were at liberty to reopen and re-examine all the findings of fact made by the Referee, the evidence taken upon the trial not only fully supports those findings in every particular, but contrary findings would have been against the weight of evidence.

Up to this point, this case has been considered only on the technical objections raised by the defense.

It is now proposed to show, although perhaps unnecessary under the plaintiff's contention, that the equities are wholly in favor of the recovery had by him.

The only items to which attention need be called and the testimony taken in support of them, are the three already considered.

First.—AS TO THE RIGHT TO DEDUCT THE $40,000 PENALTY.

(A). *There was no provision in the original contract which referred to or provided in any way for the deduction of $40,000 from the plaintiff, provided the work was not finished in time.*

The contract provided that the plaintiff should have until the 1st day of August, 1887, in which to complete the work.

See Contract, Article I, Section 2, page 139, fols. 445-446.

There was a supplemental contract in writing made between the parties in reference to this work

on July 12th, 1887, but in that contract no provision was contained which covered or in any way related to a forfeiture for non-completion within the time fixed.

The defendant, however, claimed that after the making of the original contract and prior to the supplemental contract, an agreement was entered entered into in relation to the $40,000 forfeiture.

It sought to establish that contract simply by correspondence.

On March 19th, 1886, Mr. Miller, the general manager of the defendant wrote the following letter to the plaintiff:

"March 18th, 1886.

HEMAN CLARK, Esq.,
2066 Fifth Ave., New York.

Dear Sir.—I think there is some misunderstanding as to the consideration to be paid for. When Mr. Hegeman's despatch arrived here the other day Mr. Kendall was absent, and I could not lay my hands on the proposition you made, dated January 26th. I telegraphed, in reply, that the consideration was to be $19,500 per mile, understanding the contract to require completion June 1st, 1887. I find, however, that the contract was made for completion August 1st, and therefore the consideration should be $3,914,600, instead of $3,954,600. You will readily see this from the fact that your written bid of Jan. 26th was $3,990,000; June 1st, $3,950,000; August 1st, while the contract as signed was $3,954,000 or $4,000 more than you offered to do the work for. The agreement was $19,500 per mile, completed June 1st; $40,000 off if allowed to August 1st.

Yours truly,

ROSWELL MILLER,
Gen'l Manager."

See Letter, page 326.

On April 1st a telegram was sent by Mr. Miller to Mr. Clark as follows:

"MILWAUKEE, April 1st, 1886.

HEMAN CLARK,

2066 Fifth Avenue, New York.

Have you heard from Hegeman in regard to error in contract? We are perfectly willing to let the compensation stand as it is, completion to be June 1st, and if at any time you desire till August 1st, you can have the additional two months, the compensation to be reduced forty thousand dollars ($40,000), as stated in your proposition, upon making the same to me in writing.

ROSWELL MILLER."

See Telegram, page 327, fol. 979.

To this telegram the defendant contended an answer was sent by telegram by Mr. Clark.

The telegram was not produced, but testimony was given tending to show that it had been lost.

Under the plaintiff's objection, Mr. Miller was permitted to give the contents of the telegram according to his recollection, which was: "Your understanding correct. We will forfeit $40,000 if road not completed June 1st."

See Testimony, page 327, fol. 981.

One other officer of the defendant gave testimony somewhat similar to that of Mr. Miller.

See Testimony of Kimball, page 314, folio 941.

It is a noteworthy fact that, while the contract to which it relates and the letters and telegrams sent

by Miller to Clark are to be found, this telegram, the most important of all the evidence, cannot be found. That so important a paper, if it ever existed, should be missing, in a well organized railroad office, is surprising.

The defendant denies that he ever sent such a telegram or authorized the sending of it.

See testimony of Clark, pp. 442–443, fols. 1326–1327.

The testimony also shows that an attempt was made by Mr. Miller to make the deduction bodily in the contract as it was originally drawn, and was sent in that condition for the signature of Mr. Clark after it had been signed by Mr. Miller.

The lump sum or price to be paid was inserted as $3,914,600, and the time of completion fixed as August 1st, 1888.

Mr. Hegeman, representing Mr. Clark, perceiving the error, telegraphed Mr. Miller, who sent him a reply, giving him authority to make the proper change, as follows:

"MILWAUKEE, March 12, 1886.

W. W. HEGEMAN,

Yonkers, New York.

The contract should be at the rate of nineteen thousand five hundred dollars per mile. You can correct to this amount and execute in New York.

ROSWELL MILLER.

See Telegram, p. 325.

The contract price, at $19,500 per mile, for 202.8 miles, amounts to $3,954,600.

Before the execution of this contract by Heman Clark the change of these figures was made, and he entered upon the contract, as follows:

"In Article 15, near the beginning and at the end, the amount of $3,914,600 was changed so as to read $3,954,600 before delivery of this contract."

This is the contract which is sued upon by the plaintiff, and is annexed to the defendant's answer.

The contract, as changed in New York by the permission of Mr. Miller, and resulting in the deduction of $40,000 from the original bid of $3,990,000, was undoubtedly the contract agreed upon between the parties, making full allowance for the $40,000 of penalties.

The testimony shows distinctly that there has been either a persistent effort on the part of Mr. Miller to procure a further deduction of $40,000, or that there is an honest confusion in his mind which resulted in this mistake.

All parties concede that Mr. Clark's original bid for the work was $3,990,000, and that after the preliminary talk about the $40,000 it was finally practically adjusted as at the rate of $19,500 per mile, which is $3,954,600, and almost equal to a complete deduction of $40,000 from the original bid.

This is shown by Mr. Miller's own evidence and the statements contained in his letters.

He states distinctly that Clark was to have, if completed June 1st, $3,990,000; if it was completed August 1st, $3,950,000. This is the exact language of the testimony:

> "The completion was to be the following year; if completed June 1st, $3,990,000. If completed August 1st it was to be for $3,950,000—$40,000 less.
>
> There were those two separate amounts I have stated—$3,990,000, if June 1st; $3,950,000, if August 1st."
>
> See testimony, pages 324–325, fols. 972–973.

The difference of $4,600 seems to be the result of a compromise between the demand for the $40,000 for forfeiture and the demand for the doing of the work at $19,500 a mile.

This same testimony is repeated in the letter of March 19th, from Mr. Miller to Mr. Clark, in which he says:

> "You will readily see this from the fact that your written bid of January 26th was $3,990,000 June 1st, $3,950,000 August 1st, while the contract as signed was $3,954,000, or $4,000 more than you offered to do the work for."

See Letter, page 326, fol. 977.

An attempt in this letter is made to make use of the simple difference of $4,600 with which to make an additional deduction of $40,000 more, and to pretend that the question as to the date of finishing being fixed at August 1st was not known to Mr. Miller at the time of the sending.

Now the bids are not produced. They were placed in the custody of the defendant, and the responsibility for their non-production rests with it.

The insertion of a $40,000 penalty had been resisted by the plaintiff from the start. No mention of such a provision is found in the agreement. The allowance had been substantially made by the plaintiff in the deduction made from his first bid of $3,990,000. A further deduction was successfully resisted when the attempt was made a second time when the contract was executed.

All these facts and circumstances seem to indicate that the $40,000 had been taken off the original price of $3,990,000, and was not intended to be taken off a second time.

There is another important element to be considered as to whether there was any telegram sent in

the form and actual words as given by the defendant's witnesses.

The telegram, as sent, does not appear in its language to be an answer to the one sent to Clark by Mr. Miller.

The first telegram is in the following language:

> "We are perfectly willing to let the compensation stand as it is, completion to be June 1st, and if at any time you prefer until August 1st, you can have the additional two months; the compensation to be reduced $40,000, as stated in your papers, upon communicating the same to me in writing."

This telegram provided for the following conditions:

1st. The alteration of the time of completion to June 1st. This was never altered or changed in any way.

2d. If Clark desired until August 1st, the compensation was to be reduced $40,000.

3d. If at any time he desired the additional two months up to August 1st, and submit to the penalty, he could have the same upon communicating it to Mr. Miller in writing.

No communication asking for the extension is produced. No proof is adduced that any extension was asked.

The alleged telegram of Clark to Miller in the language given, is not in any way an answer to the telegram of Miller to Clark of April 1st, for the following reasons:

1st. It does not consent to the change of date to June 1st.

2d. It does not ask for the additional time to August 1st.

3d. The alleged telegram does not call for an immediate answer, for it states that if at any time additional time was desired, it would be granted on application in writing.

It is evident that either no telegram was sent, or that the defendants are mistaken in describing the contents of the one that was sent.

(B). *But there is still a more serious difficulty for the defendant before it could establish this contract, and that is the failure of proof to show that such a telegram was ever sent by Mr. Heman Clark.*

The only proof offered upon this point is that three men living in Milwaukee saw what they called a telegram, containing certain words, and with the name of Heman Clark subscribed.

It was not proved

1st. By whom the paper was delivered.

2d. Whether it was written upon the telegraphic blanks of any telegraph company.

3d. When and where it was received by the defendant.

4th. Whether such a telegram was ever received by any telegraph company.

5th. Where or when it was received by the company.

6th. That Heman Clark ever signed such a telegram.

7th. That he ever sent or authorized the sending of such a telegram.

8th. Neither the destruction of the original telegram, if sent by Mr. Clark, is proven, nor the existence of any such telegram.

It is sought wholly and entirely to make a contract for Mr. Clark, the plaintiff, upon the proof that some one saw a paper containing certain words upon which some one else, not Mr. Clark, had signed his name.

It is confidently submitted that it is established by authority that no party can be bound by evidence contained in a paper, letter or telegram, without the essential elements of proof above enumerated.

The telegram is necessary to the establishment of the contract. If it falls to the ground, the contract falls with it.

The question as to the proper proof of a telegram is well settled at present in our courts.

The primary evidence is the original telegram in the custody of the company at the place where it is sent.

This original telegram, of course, is competent without other proof when found in the handwriting and over the signature of the party.

If the telegram is not in the handwriting of the party sought to be bound thereby, then authority for sending must be proved.

If the original telegram had been destroyed by the company or lost, then the loss may be proved and a copy of the original offered in its stead.

If the transcript of the message delivered to the person addressed is sought to be used, there must be competent proof that the alleged signer did actually send or authorize it to be sent.

The Oregon Steamship Company *v.* Otis, 100 N. Y., 446.

Mattison *v.* Noyes, 25 Ill., 591.

Chisholm *v.* Beaver Lake Lumber Co., 18 App. Court Rep. (Ill.), 131.
Hoenely *v.* Whipple, 48 N. H., 487.
Smith *v.* Easton, 54 Md., 138.
U. S. *v.* Babcock, 3 Dill, 576.
Barons *v.* Brown, 25 Kansas, 410.
Williams *v.* Birckell, 37 Miss., 682.
Gray on Telegraph Com., Secs. 128-137.
Rice on Evidence, page 1015, etc.

It was upon this evidence, and this alone, that the learned Referee found "that the plaintiff made and entered into a supplementary contract, whereby he agreed with the defendant to complete his performance of said contract on or before June 1st, 1887, and to allow the said defendant, by way of forfeiture, in case the said railway were not so completed by the 1st of June, 1887, the sum of $40,000."

See Referee's Findings, page 112, folio 334.

(C). *The evidence, however, conclusively shows, even if the contract of forfeiture as alleged, had been made, that the plaintiff was prevented by the wrongful acts and omissions of the defendant from completing the work under the contract within the stipulated time.*

It will be remembered that the plea of the defendant is that the plaintiff to avoid the forfeiture was obliged to complete upon the 1st of June, 1887. The terms of the contract, however, do not require completion until August 1st. 1887.

It is conceded that the contract was not completed until the 1st of November, 1887, and therefore, after the expiration of both the time limits of June 1st and August 1st, 1887.

The plaintiff claims that the reason that he did not complete within the time limited was the failure of the defendant to supply him with rights of way necessary to the completion of the road, and by reason of certain other acts and omissions of the defendant which prevented the completion of the contract within the stipulated time.

The principal cause of delay was the failure of the defendant to procure the necessary rights of way, borrow pits, waste banks and station grounds

There was a distinct provision in the contract making it obligatory upon the defendant to procure them.

The contract provides in the following language:

> "For and in consideration of the pay-
> "ments, covenants and agreements of the
> "party of the second part, to be by said
> "party made, kept and performed, as here-
> "inabove set forth, the party of the first part
> "hereby covenants and agrees to furnish, at
> "its own cost and expense, and at such time
> "or times as not to delay the execution of the
> "work in this agreement mentioned and re-
> "ferred to, all the lands now or hereafter
> "marked out and designated by the said first
> "party's chief engineer for right of way,
> "borrow pits, waste banks and station
> "grounds of all kinds, as the said lands may
> "be required for the construction of the
> "railroad covered by this agreement."

See Contract, Article 12, Section 1, page 169.

There are also certain other provisions to this contract imposing the following obligations upon the defendant:

The obligation to transport men free of charge.

Article 13, Section 1, p. 170.

To transport tools and implements.

Article 13, Section 2, p. 171.

To transport supplies.

Article 13, Section 3, p. 171.

To transport material.

Article 13, Section 4, p. 171.

There is also an obligation upon the defendant to furnish steel rails, angle bars, track bolts and track spike, and to unload the same without unnecessary delay.

Article 14, Section 1, p. 172.

It will be impracticable to mention all of the delays occasioned by the defendant during the progress of this work.

These delays were substantially, in the absence of evidence to the contrary, conceded by the defendant.

It will only be necessary to deal with the most important delays, as the proof of the existence of any one is sufficient to break the time limit of the contract and avoid the forfeiture.

The most conclusive evidence as to the number of rights of way which were procured after June 1st, is the following list, picked out from Exhibit 51, being a list of the counties, stations and dates of the procuration of rights of way.

APPANOOSE COUNTY.

	Station to Station.		Date.	
	1634	1642	Sept. 23, 1887.	
Rathbun Depot.	1784+68	1815+35.	" " "	Extra for borrow and waste.

PUTNAM COUNTY.

	3302+15	3315+30.	June 7.	
	3406	3412	Aug. 30, 1887.	Extra for station grounds.
Powersville.	3446	3448	Nov. 3, "	Extra width.
	3727+42	3741+50.	June 30. "	Extra for station grounds.
Lucerne.	3791	3791+75.	" 25. "	Extra width.
	3793+10	3794+45.	" " "	Extra width.

SULLIVAN COUNTY.

Osgood.	5027	5032	Aug. 4, 1887.	Extra width.
	5031+50	5033+65.	" " "	Extra width.

GRUNDY COUNTY.

Loredo (Gorham).	391+50	410	June 13, 1887.	Depot grounds.

LIVINGSTON COUNTY.

Chillicothe.	2242+23	2261+25.	June 13, 1887.	Extra width.
	2240+73	2261+25.	" " "	Extra width.
	1774	1757+50.	Sept. 13, "	Depot grounds.
Ludlow.	1728+54	1718+79.	" 23, "	Extra for waste banks.

CALDWELL COUNTY.

	1395	1387+35.	Sept. 19, 1887.	Reservoir.
Braymer.	1158+50	1144	Oct. 21, 1887.	Extra for borrow and waste.
	1140	1124	Nov. 12, 1887.	Extra width.
	1124	1110	Nov. 1, 1887.	Extra width.
Cowgill.	916	885	Sept. 16, 1887.	Extra width.

RAY COUNTY.

	369	366+50	July 12, 1887.	Extra width.

CLAY COUNTY.

	417+43	424	June 8, 1887.	Extra width.
	430+73	436+50	Nov. (?), 1887.	Extra width.
	508	510	Sept. 13, 1887.	Extra width.

MINNEVILLE, HANNIBAL AND ST. JOE CROSSING.

1384	1404	Oct. 27, 1887.	Lease from H. & St. J. R. R.

See Record, p. 374.

By this list it appears that there were twenty-five places where, until after June 1st, 1887, the

rights of way had not been procured. Of these only eight were procured in the month of June; one additional was procured during the month of July; three more were procured during the month of August; six were procured during the month of September; two were procured during the month of October; four were procured during the month of November.

1st. *The delay at Minneville was most conclusively proved.*

The rights of way were asked for in writing upon February 1st, 1887. The letter is from Hegeman to Kimball, dated February 1st, 1887, and reads as follows:

"Mr. F. W. Kimball, Manager Construction, Milwaukee, Wis. Dear Sir: W. E. Dorwin & Co. have served us with notice that, if the Hannibal crossing, near Minneville, is not settled so they can do their work in the favorable time of the year, or in short, if the delay in procuring the right of way forces them to do the work in wet weather, that the added cost of doing the work will be charged to us on force account. Cannot the right of way be procured at this point so that in case a favorable opportunity offers we can have him get at that work and finish it before the spring rain comes on?

Respectfully yours,

W. W. HEGEMAN."

See Letter, Plaintiff's Exhibit No. 5, page 237, fol. 710.

In response the following letter was received from Mr. Kimball, February 3d, 1887:

"February 3d, 1887.

Mr. W. W. HEGEMAN,
Ottumwa, Iowa.

Dear Sir:

The Minneville crossing matter has now been definitely settled, and Mr Appleton will have the line staked out so that Mr. Dorwin can go at it at any time in the spring.

Yours truly,
F. W. KIMBALL."

See Letter, page 320, fol. 958.

Subsequent testimony shows that the statement in this letter is not correct.

On February 28th a second letter was sent by Mr. Hegeman to Mr. Carpenter, Division Engineer, as follows:

"February 28th, 1887.

C. A. CARPENTER, Esq.,
Division Engineer,
Lawson, Mo.

Dear Sir:

Please note copy of Mr. Kimball's letter enclosed, regard to Hannibal crossing, near Minneville. I met Mr. Dorwin at Kansas City yesterday, and I gathered from his statements that there is a considerable piece of the line immediately west of the Hannibal crossing where the right of way is not yet settled. Mr. Dorwin has very large interests that require his attention, and he is anxious to complete his contract with us without further delays. Can you not urge a settlement of the question so that he can go ahead? There seems to be a misunderstanding somewhere, as Dorwin states that he has

positive orders to do no work west of the Hannibal track. * * *

Yours truly,

W. W. HEGEMAN."

See Letter, page 238, fol. 712.

This crossing was not procured until October 27th, 1887. This is positively proved by the written agreement made, executed and delivered on that date permitting the crossing.

The right of way missing until October 27th, 1887, was from Station 1382 plus 50 to 1410, a distance of of 2,750 feet.

See testimony of Hegeman, page 239, fol. 715.

Mr. Hegeman says that the Railroad Company fought for this crossing a year and a half; that it was originally intended to cross at grade, but it was arranged that we should grade a new line for them and come down and take their old line, just keeping inside.

See testimony of Hegeman, page 238, fol. 713.

He also says that the right of way was not procured until the latter part of October, 1887.

See testimony of Hegeman, page 238, fol. 714.

This was the same right of way that had been requested in letters of February 1st and 28th, 1887.

Mr. Russell, plaintiff's witness, testifies that he went there in October, 1887, to put in the connec-

tion for the Hannibal and St. Joe Railroad at Minneville.

Testimony Russell, p. 377, fol. 1130.

The engineer told him that the arrangements had been completed on the day previous for this right of way.

Testimony Russell, p. 378, fol. 1133.

The rest of the work around Minneville crossing had been completed a long time before. The work at Minneville occupied ten days for grading and one day for track laying (p. 382, fol. 1145).

This delay is practically admitted by the defendant's witness and engineer, Mr. Kimball, who testifies as follows:

"There were some delays near Randolph Bluff, owing to the definite location of the bridge not being determined; and there was quite a long delay in regard to the grade crossing of the Hannibal and St. Jo road at Minneville."

Testimony of Kimball, page 316, fol. 946.

The extent of the delays at this point is confirmed by the profile.

An examination of this profile shows that the last of the main work on both sides of the Minneville crossing was done on November 15th, 1886, with the exception of two small fills made March 15th, 1887, and April 15th, 1887.

See Profile from Stations 1380–1410.

The length of the delay from failure to obtain this right of way was at least one year, or, as shown from this record, November 16th, 1886, to October 27th, 1887.

It was not confined to track laying, but covered grading as well.

This is testified to by Mr. Russell, in which he says that the work at Minneville was the last work done, occupied ten days grading and one day for track laying.

See Testimony of Russell, page 382, fol. 1145.

The same is testified to by Mr. Kimball, who testifies:

"All but about a quarter of a mile was finished some time during May 1887. The track laying got down there about the first of November, 1887."

Testimony of Kimball, page 316, fol. 946.

2d. *Delays at Liberty.*

This right of way was asked for by letter from Hegeman to Mr. Kimball on June 13th, 1886. The letter is as follows:

"OTTUMWA, IOWA, June 3, 1886.

F. W. KIMBALL,
Manager Construction.

Dear Sir.—Will you kindly provide right of way for the line near Liberty. It is desirable to open the heavy cuts in the third division at once. At 1068 and at other points I am advised it is impossible to do this on account of delay in rights of way matters.

Respectfully yours,
W. W. HEGEMAN."

See Letter, page 236, fol. 706.

Mr. Hegeman says that afterwards he went over the line with Mr. Kimball and spoke to him about these rights of ways and shortages in rights of way and points where rights of way had not been provided.

See Testimony of Hegeman, page 236, fol. 707.

This delay was also admitted by Mr. Kimball, who testified as follows, when asked about the letter of June 3d:

I do not know when those rights of way were obtained.

Testimony of Kimball, page 337, fol. 1010.

An examination of the progress profile, No. as to Station 1100, near Liberty, shows grading and embankment work done on the following dates:

October 15th, 1886; November 15th, 1886; December 15th, 1886; January 1st, 1887; April 15th, 1887.

It appears conclusively that the rights were needed and asked for on June 1st, 1886, but were not given until the autumn or fall of that year.

The record of obtaining rights of way fails to show when the rights of way were obtained at Liberty.

The following entry appears under head of Clay County:

Liberty Station 1100.

No date, however, is given.

There was also some delay at Station 1068. This station was near Liberty. The right of way was asked for in the letter of June 3d, 1886.

The progress profile shows the first dates of work were July and August, 1886. The record of rights

of way show that rights of way were not entirely acquired here until October 2d, 1886. Station 1057–1072, October 2, 1886, extra width.

3d. *As to the delays south of Lawson.*

This right of way was also asked for by letter.

On July 26th, 1886, Mr. Hegeman writes the following letter to Mr. Kimball as Manager of Construction:

"July 26th, 1886.

Mr. F. W. KIMBALL, Manager of Construction.

Dear Sir—I wish to call your attention to the unsettled right of way at station 400, 470 to 500, 540 to 560, south of Lawson, and request that as little further delay as possible may be given us there.

We have a large force on the work, and already considerable inconvenience and expense has fallen upon the contractor through attempting to open the work at these various points and afterwards being obliged to abandon them and shift his force off.

Respectfully yours,

W. W. HEGEMAN."

See Letter, page 236, fol. 708.

In answer to this claim Mr. Kimball wrote that from a conversation with the right of way agent he understood that all parties have agreed to allow contractors to go on; that as far as questions of law are concerned contractors have been empowered to go on for some time. It was only because the contractors were afraid of some of the loud mouths of those Missouri mossbacks, who threatened to shoot if they went on.

See Letter of Kimball, page 315, fol. 945.

It appears that this railroad was being built in the Jesse James country, and that the engineer

expected the plaintiff to obtain possession of the land himself in face of an armed force instead of providing it in accordance with the covenant of the agreement.

Mr. Kimball nowhere testified that the contents of this letter are true. In fact, it is based only on the statements of the right-of-way agent, and not on Mr. Kimball's own knowledge.

The profile and record show that, notwithstanding that the rights of way were asked for in July, 1886, they were not furnished until sometime after.

The record of rights of way show the following:

Stations.	*Date Acquired.*
417–424	June 8th, 1887.
403–406	November 22d, 1886. Extra width.
381–407+90	November 22d, 1886.
430+73–436+50	November, 1887.
503–517, extra width	October 16th, 1886.
508–510, "	September 13, 1887.
359+50–575+93, extra width	August 30, 1887.

The progress profiles show that while most of the grading was done in July and August, a large portion, by reason of the failure in obtaining right of way, was not done until the year 1887. This shows an apparent delay from the middle of 1886 to the middle and latter part of 1887.

4th. *Delay at Randolph Bluff.*

On June 16th Mr. Whittemore, the Chief Engineer, directed that no work should be done at or near Randolph Bluff until further advised.

Upon June 16th Mr. Hegeman replied in writing, "Yours of 18th inst. and profile of Randolph Bluffs line are at hand. I note what you say in reference to possible changes of line in the future,

and will do no work west of Station 50 until further advised by you."

See Testimony, page 241, fol. 721.

On July 19th, 1886, Mr. Hegeman wrote the following letter:

"July 19th.

"D. J. WHITTEMORE,

"Ch. Eng.

"*Dear Sir.*—I have ordered work suspended on the 30 foot span for Wabash crossing at Chillicothe, as you requested in letter of 16th inst.

"Respectfully yours,

"W. W. HEGEMAN."

See Letter, page 336, fol. 1006.

Mr. Hegeman's testimony is as follows:

> "We were delayed on the Randolph's Bluff matter five or six months. The final western terminus was not defined by the company, and they ordered me not to do work beyond a certain point, Station 50, until the location of the line was finally determined to the terminus at the Missouri River bridge. We got the order to resume work west of Station 50 about September 1st, 1886."

See Testimony of Hegeman, page 241, fols. 721–722.

This delay at Randolph Bluffs was conceded by Mr. Kimball, and in his testimony he testifies as follows:

> "It did make a delay at that point, as
> "they could not enter at that point for two

"or three months, possibly even four; I "can't remember now."

See Testimony Kimball, page 336, fol. 1007.

5th. *Delays at Chickenbristle.*

This was occasioned by defective plans of trestle bridge at this place. It was located over the Fishing River. It caused a delay of three or four weeks.

See Testimony Hegeman, page 254, fol. 760.

This delay is nowhere denied.

6th. *Delays as to fixing of divisional terminals as between Gault and Chillicothe.*

It was at first determined to put the division terminals at Gault, and the change from Gault to Chillicothe was not finally decided until the fall of 1886. This caused a delay of five months. It is shown by Mr. Hegeman's testimony, as follows:

"I remember how long we were prevented from starting foundations at the Chillicothe terminus. The question of the division terminal was not decided until the autumn of 1886, possibly in September. That is the division terminal where the round house and shops were to go. It was originally decided to put them at Gault, some twenty-five miles north. Then Chillicothe came in for a claim for them, and several months elapsed until it was finally decided where it would be located. Chillicothe finally gave a subsidy, and it was located there. It carried with it the divisional terminal and yards. That prevented us from doing any work at Gault until it was decided, which was in the fall of 1886. From the time we were at Liberty to work there until the time we obtained

the right to work there, the question was open for a period of five months."

See Testimony of Hegeman, page 240, folios 719–720.

The determination of right of way was asked for in writing on August 31, 1886.

See Letter, p. 239, fol. 716.

It was again asked for on September 13th, 1886.

See Testimony Hegeman, p. 240, fol. 718.

The progress profile also confirms the fact that no work was done at Gault until November 15th, 1886.

See Profile.

7th. *Other delays.*

There were also other delays resulting from the failure to deliver steels rails.

See Letters to Hegeman from Kimball, January 14th, 1887; February 5th, 1887; March 11th, 1887; pages 332–333.

It is unnecessary, however, to multiply instances of the delays in this work caused by the defendant.

The uncontradicted testimony shows that these delays were serious and for long periods of time.

It further appears that the work was immediately completed after the furnishing of the right of way at Minneville at the Hannibal and St. Jo crossing.

The expedition of the plaintiff is shown conclusively from the fact that the very moment that the

right of way was procured at Minneville, the final grading was immediately done and the track laid.

Mr. Russell testified: "I do not know when that right of way was obtained, not to speak certainly as to the date, as near as I can recollect that, and the only way that I can actually locate it is the fact that the engineer of the company told me the day that I made the connection that the papers for that right of way had only been fixed up the previous day."

See Testimony of Russell, page 378, folio 1133.

There was no unfinished work, except this Minneville work after October 27th, 1887, except some extra work.

Testimony of Russell, page 383, fol. 1149.

8th. *There was also extra work ordered which increased, as a matter of course, the time limit for performance, and thus destroyed the limit.*

The defendant is thus obliged to concede, upon the uncontradicted testimony, the following propositions:

1st. That the rights of way were not procured until after June 1st, 1887.

2d. That they were not procured until after August 1st, 1887.

3d. That they were not procured until after October 27th, 1887.

While not denying this cause of delay on their part, the defendant endeavored by the testimony of Mr. Kimball to claim that these failures to obtain rights of way did not delay the work, because the plaintiff was not ready to do his track laying.

This is denied by the plaintiff in the testimony of Mr. Russell, who says that if the rights of way had been furnished in time, the track would have been laid in time.

Testimony of Russell, pages 377-386.

It is, therefore, submitted that this testimony fully warranted the finding of the Referee that the defendant failed to furnish the plaintiff with rights of way as by said contract it had agreed to do in time to enable the plaintiff to complete his contract prior to the 1st day of June, 1887. That the plaintiff was thereby prevented from completing his contract within the stipulated time.

See Findings 7 and 8, page 112, folios 335-336.

Under the well-established principles of law, this failure on the part of the defendant abrogated the time limit, if any had been fixed, and supported the conclusion arrived at by the Referee that the defendant was not entitled to charge the plaintiff or retain and deduct from the amount earned and payable to him under the contract, the sum of $40,000 as a forfeiture and liquidated damages.

See First Conclusion of Law, page 117.

Second.—AS TO THE RIGHT OF THE DEFENDANT TO DEDUCT THE CHARGE FOR NUT LOCKS.

(*a*). *As to the contract provisions.*

There are no specific provisions in the contract requiring the road to be furnished or built with nut locks.

In other words, the words "nut locks" are not mentioned in words and terms in the contract.

The only provisions of the contract which could

possibly have any reference to nut locks are the following:

1st. "The party of the second part further agrees to furnish and lay in place all the track material required by first said party for 202.8 miles of main track, and for the hereinafter-mentioned side-tracks, of its railroad aforesaid, including in said track material, so by him to be furnished and laid in place, steel rails of sixty pounds per yard; *splices and bolts of the J. T. Clark pattern*, and spikes and ties; and all said material shall be of the said first party's standards and sizes.

"The said second party also agrees to purchase from the said first party all the steel rails, angle-bars and bolts for same, and all the track-spike required for the main and side tracks aforesaid, and to pay for the same at the following rates, to-wit:

"Steel rails, $37 per gross ton, f. o. b. in Chicago.

"Angle-bars, 1.65/100 cents per pound, f. o. b. in Milwaukee.

"Track-bolts, 2.60/100 cents per pound, f. o. b. in Milwaukee and Chicago.

"Track-spike, 2.65/100 cents per pound, f. o. b. in Chicago."

See Contract, Article 6, Section 1, p. 159, fol. 477.

"The party of the first part further agrees to sell to the said second party all the steel rails, angle-bars, track-bolts and track-spike required for laying all the main and side-tracks mentioned and referred to in this agreement, at the prices hereinabove, in Section 1 of Article 6, agreed by said second party to be paid for the said materials respectively."

Article 14, Section 1, p. 172, fol. 515.

"It is further mutually understood and agreed, by and between the said parties, that the said first party has contracted with manufacturers, esteemed to be safe, responsible and reliable, for all the steel rails, angle-bars, track-bolts and track-spikes, which it, the said first party, has hereinabove (in Section 1 of Article 14) agreed to sell and deliver to said second party.

Article 16, Section 6, p. 177, fol. 531.

"For and in consideration of the payments, covenants and agreements of the party of the first part, hereinafter contained, to be by said party duly made, kept and performed, the party of the second part hereby covenants and agrees to *furnish all the material for, and also* to execute, construct and finish in every respect, in the most substantial and workmanlike manner, all the work hereinafter specified and required by said first party to be done in the construction and completion of said first party's line of railroad, extending, as aforesaid, from a point in the City of Ottumwa, Iowa, to Harlem Station, in Clay Couniy, Missouri, a total distance of 202.8 miles."

See Contract, Article I, Section 1, p. 148, fol. 444.

(*b*). As to the facts.

These nut-locks were a spiral of spring steel, placed over the bolt against the angle-bar on one side and against the nut on the other. As you press the spiral together that makes a constant pressure against the nut. The bolt goes through the rail and connects the angle-bar. The washer is between the nut and the angle-bar supporting the joint.

See Testimony Hegeman, page 245, fol. 733.

The plaintiff was ordered to put these nut-locks on the road at the beginning of the work. He protested against their use, and finally yielded under the promise that the matter would be adjusted at the completion of the road.

The following is Mr. Hegeman's version:

"I asked him (Mr. Kimball) what he wanted to do about the use of these nut locks, and about compensation for them, and stated to him that they were not embraced in the contract, and that I wanted to know his pleasure in the matter. He told me that he wanted them put on; that at that time it was a standard with the St. Paul Road—at least, that they were using them. As to compensation to put them in place, that they would send them down and charge them to us, and the matter would be adjusted finally at the end of the work."

"I objected to putting them on at the expense of the contractor. That was the occasion of his saying that it would be adjusted afterwards. The nut-locks were sent with the other track material by the Chicago, Milwaukee & St. Paul Road, and charged to us, and taken out of our contract under our protest: $9,558.63."

See Testimony of Hegeman, page 245, folios 734–735.

Mr. Hegeman states positively that he never saw the plan.

He testified as follows:

"As to Mr. Whittemore's statement that "I was shown a joint set up with the J. T. "Clark splices or a drawing of the same "prior to entering into this contract, that is "not correct."

See Testimony of Hegeman, page 363, fol. 1088.

The uncertainty of Mr. Whittemore, and his unwillingness to testify positively, leaves the preponderance of evidence in favor of the plaintiff upon this point, while the affirmative is upon the defendant.

It is not extremely important whether the plan was exhibited or not.

Mr. Whittemore testified actually that there was nothing on the plan that would indicate anything but a washer.

See Testimony of Whittemore, page 304, folio 912.

The Court will recognize the fact that a washer is a small piece of iron, which in use exactly resembles a nut lock. It is not, as the nut lock; a patented article, and can be furnished at slight cost.

Mr. Whittemore afterwards stated that he showed Mr. Hegeman, prior to the making of the contract, a full size joint with nut locks on it.

Testimony of Whittemore, page 310, folio 928.

Mr. Hegeman says positively that Mr. Whittemore is mistaken. That Mr. Whittemore never showed him any splice with nut locks on it.

He says as follows:

"I was introduced to Mr. J. T. Clark, General Superintendent, to whom I said that I had been referred to him because we were to build the Kansas City line, and his splice was to be used; that I came for information about the splice. He showed me a pair of forged splices. (By forged I mean hand-made splices.) And my inquiry was as to their weight, which was given by Mr. Clark. That was all there was to the conference.

"By a pair of splices I mean splices on each side of the rail; the inside and outside splice on one joint. They were not set up; they were loose. They did not have any nut locks on them. I did not see any nut locks, nor were they shown to me prior to making the contract. Mr. Whittemore did not go with me and show me anything of the kind—the J. T. Clark splice and nut locks put up. I do not think that he went with me to Mr. Clark at all. I never saw the plan that was offered here showing the nut locks and splices—not until it was offered in this case. I never saw it before."

See Testimony of Hegeman, pages 363–364, folios 1089–1090.

Mr. Whittemore states positively that at the interview with Mr. Clark, of which he is not absolutely sure, nothing was said about nut locks.

His testimony is as follows:

"I can't say that the Verona nut lock was mentioned, or that any nut lock was mentioned. I think there were two pair of splices that were shown to him on my table upstairs. I remember that I went down to Superintendent Clark's office with Mr. Hegeman. His attention was called to the top joint, but not especially to the nut locks, not especially to a bolt or a nut."

See Testimony of Whittemore, page 311, folio 933.

Mr. Hegeman says that Mr. Clark showed him a splice not set up. The inside and outside splices on one joint. This splice was not set up and did not have any nut-locks on them.

See Testimony of Hegeman, page 363, fol. 1089.

Mr. Hegeman also says that he never saw a joint set up.

Page 3[illegible], fol, 1090.

Mr. J. T. Clark, the defendant's superintendent, is not called.

It is insisted by the plaintiff—

1st. That what happened prior to the contract is merged in the contract.

2d. That there is not enough in the testimony to put the plaintiff upon notice that he was to furnish any patented article other than the J. T. Clark splice.

The nut lock was in no sense a part of the article afterwards patented and known as J. T. Clark splice patent. But the Verona National nut lock was an entirely distinct patent which was at times used in connection with the J. T. Clark splice.

3d. That the nut lock, as exhibited, could not be distinguished from a washer.

4th. That not a word was spoken at the time of the exhibit as to the requirement of this patented nut lock.

It was established by a preponderance of evidence that the nut lock is no part of the splice.

It is true, that Mr. Whittemore endeavored to establish such a theory.

See Testimony Whittemore, page 304.

His testimony was distinctly negatived by the defendant's other witnesses.

Mr. Frederick A. Delano says nut locks are not part of the splice, but part of the joint.

Testimony of Delano, p. 421, fol. 1261.

Mr. Lewis T. Moore says nut locks are not part of the splice nor part of the bolt; it is part of the joint. Considers nuts and bolts one thing.

See Testimony of Moore, pp. 426, fol. 1278.

Mr. J. B. Moll testifies nut locks are part of the joint and bolt.

Testimony of Moll, p. 435, fol. 1304.

Mr. Hegeman says that there is no designation under the contract for nut locks.

Testimony Hegeman, p. 245, fol. 734.

This evidence, it is submitted, fully supported the finding of the Referee that the plaintiff was under no obligation to furnish and pay for patented nut locks to be used in the construction of the road.

See Referee's Findings 9, 10, 11 and 12, pp. 112-113.

And that those findings of fact fully supported the conclusion that the plaintiff was not legally indebted to the defendant in any sum whatever therefor.

See Findings 3, 4 and 5, page 118.

Third.—AS TO THE RIGHT OF THE PLAINTIFF TO RECOVER THE VALUE OF TIMBER BELONGING TO HIM TAKEN AND USED BY THE DEFENDANT.

(A). As to the plaintiff's proof.

The ownership, quantity, taking and value are distinctly proved.

Mr. Hegeman says:

"The 97,000 feet B. M. of bridge timber alleged to have been taken and used by the company during the washout south of Chillicothe about June 1st, 1888, charged at $2,425, was used after the completion of the contract. It belonged to Heman Clark. It consisted of square timber of various lengths and sizes stored in the Chillichothe yard of the Railroad Company. It was surplus material left on hand. The Chicago, Milwaukee & St. Paul Railroad Company took possession of and used that material. There were washouts during a big storm in the summer of 1888 and to make temporary repairs this material was taken. There was no objection to the taking of it made by me at that time; 97,000 feet of it was taken. The fair value of it was $25 a thousand feet; the total would be $2,425. No part of that has been paid."

See Testimony of Hegeman, page 246, folios 736–737.

The validity of this claim is further evidenced by the written demand made by Mr. Hegeman upon Mr. Whittemore on March 3d, 1890, for the value of this timber.

See Plaintiff's Exhibit No. 24.

It is as follows:

"MILWAUKEE, March 3d, 1890.

D. J. WHITTEMORE, Esq.,
Chief Engineer.

Dear Sir:

A considerable amount of track stringers, 12x16 square timber of various length, and plank, the last item, I am informed, amounted to about 2,000 feet board measure, upon the completion of the Kansas

City Line, was left in Chillicothe yard, and along the line of the road, the same belonging to the contractor. Oak piling was also left on the line at various points, but I am unable to say definitely how many lineal feet of it there was. At the time of the washout south of Chillicothe, during the summer of 1888, I am informed this material was used by your company. Mr. Van Aiken states that he had an inventory taken and that there was about 196 M of pine timber and more than ten thousand feet of piling.

Will you kindly investigate the matter and credit Mr. Clark's account with the value of such timber and piling as was used.

Yours truly,

W. W. HEGEMAN."

See pp. 246-247.

This evidence is also substantiated by the testimony of the witness House, who testifies that he knows of lumber of that character being in the Chillichote yard under the supervision of Lewis Beese, which was used in the washout near there in the spring of 1888.

Mr. House was in charge of these matters on behalf of the defendant, and his testimony is of great value.

See Testimony House, pages 386-387.

Mr. Hegeman explains in detail that the lumber taken was part of a lot of lumber that the Railroad Company would not purchase at the close of the contract, because it was not up to the standard.

The evidence shows the following :

1st. *The possession of the lumber by the Railroad Company.*

2d. *The amount of lumber actually measured.*

3d. *The value of the lumber.*

4th. *The demand in writing for the lumber.*

The only point claimed to be in dispute is whether it was taken away by the Railroad Company or by Clark.

All the plaintiff's witnesses, including the engineer House, says that it was used and taken away by the Railroad Company.

The defendant's witness, Kuehnle, says that it was taken away by Mr. Clark's foreman, and afterwards limits it to being taken away by a foreman of Mr. Clark, named Clark.

See Testimony Kuehnle, pp. 341–345.

There is no evidence in this case to show that Mr. Kuehnle knew that the man that took it away was a foreman of Mr. Clark, or, if a foreman, authorized by Clark or his representatives to take it away.

It appears uncontradicted that Mr. Clark had no foreman by the name of Clark except his own brother, and that he left the work in 1887 and never returned afterwards.

See testimony Hegeman, p. 362, fol. 1086.

This evidence, it is submitted, fully supported the Referee's finding that the defendant converted to its own use 97,000 feet of timber in the yard of the defendant at Chillicothe belonging to the plaintiff of the value of $2,425.

See Referee's 19th, 20th, 21st and 22d Findings, p. 117.

And that the facts so found supported his conclusion that the plaintiff was entitled to recover the sum of $2,425 from the defendant.

See Referee's 6th Finding, page 118.

Point VII.

There was no error committed in allowing the plaintiff to amend his complaint as to the fifth cause of action.

This question is sought to be raised by the seventeenth assignment of error.

See Record, p. 482.

It is, of course, claimed that the amendment of the complaint is not a question open to review by this Court, but even if it were, there can be no doubt but that the amendment was properly allowed.

1st. By reason of the consent and stipulation of the defendant's counsel.

2d. By reason of the rule of law that amendments should be allowed in furtherance of justice.

First.—On the hearing of this case before the Referee, the defendant found it necessary to amend its answer. This amendment was allowed by the Referee upon the agreement of the defendant that the plaintiff should have the privilege "to amend as he may be advised before the opening of de-

fendant's case, to which counsel for defendant agrees."

See Record, p. 232, fol. 694.

Second.—Amendments are allowed by the courts in the furtherance of justice.

A liberal rule prevails in the courts as to amendments.

Bamberger *v.* Terry, 103 U. S., 40.
Deyo *v.* Morss, 144 N. Y., 216.

In the case at bar, the amendment did not include an additional claim, but simply a change in the form in which the claim had been pleaded.

Under the authorities as well as the defendants consent, the amendment was fully authorized.

Point VIII.

None of the other assignments of error raises any question which is open to review by this Court.

The first, second, third, sixth, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth and sixteenth assignments of error raise simply questions as to the denial of the motion for a new trial before Judge Brown under the rule in the Southern District of New York allowing such motions to be made, which motion was addressed solely to the discretion of the Trial Court and is not reviewable by writ of error.

This is so whether the motion was to set aside a special finding, which is in effect a motion for a

new trial, or whether it was in arrest of judgment, or for a new trial.

Berry *v.* Seawall, 65 Fed. Rep., 742.
Criner *v.* Mathew, 67 Fed. Rep., 945.
Woodbury *v.* City of Shawneetown, 74 Fed. Rep., 205.

The fourth, fifth, eighteenth, nineteenth, twentieth, twenty-first, twenty-second, twenty-third, twenty-fourth, twenty-fifth, twenty-sixth, twenty-seventh, twenty-eighth, twenty-ninth, thirtieth, thirty-first, thirty-second, thirty-third, thirty-fourth, thirty-fifth, thirty-sixth, thirty-seventh, thirty-eighth, thirty-ninth, fortieth, forty first, forty-second, forty-third, forty fourth, forty-fifth, forty-sixth, forty-seventh, forty-eighth, forty-ninth, fiftieth, fifty-first, fifty-second, fifty-third, fifty-fourth, fifty-fifty, fifty-sixth, fifty-seventh, fifty-eighth, fifty ninth, sixtieth, sixty-first, sixty-second, sixty-third, sixty-fourth, sixty-fifth, sixty-sixth, sixty-seventh, sixty-eighth, sixty-ninth, seventieth, seventy-first, seventy-second, seventy-third, seventy-fourth, seventy-fifth, seventy-sixth and seventy-seventh, seek simply either to raise questions as to the proceedings had at the trial, or to the findings of fact, or the refusals to find facts as requested, and under the repeated decisions of this Court, open no question for review in the appellate court.

Shipman *v.* Straitsville Central Mining Co., 158 U. S., 356.
Shipman *v.* Ohio Coal Exchange, 70 Fed. Rep., 652.

It is, therefore, respectfully submitted that the plaintiff is entitled to recover the amount allowed by the Referee.

1st. BECAUSE THE FINDINGS OF THE REFEREE FULLY SUPPORT THE CONCLUSIONS ARRIVED AT BY HIM IN HIS REPORT, AND THE EVIDENCE FULLY SUPPORTS THE FINDINGS OF FACT.

2d. BECAUSE THE DEFENSES SET UP BY THE DEFENDANT BASED ON THE RECEIPT AS PAYMENT, ACCORD, AND SATISFACTION AND ACCOUNT STATED AS A BAR TO THE PLAINTIFF'S RECOVERY, ARE WHOLLY UNTENABLE AND WITHOUT MERIT.

Point IX.

The judgment should be affirmed, with costs.

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